90-844

No. _____

In The

Supreme Court of the United States

October Term, 1990

HOWARD ELECTRICAL & MECHANICAL, INC., and HOWARD SYSTEMS, INC.,

Petitioners,

v.

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

National Labor Relations Board unfair labor practice charges were filed by two unions against the employer with whom the unions had engaged in collective bargaining negotiations, claiming that the employer had unlawfully terminated its obligation to contribute to the employees' pension fund. Subsequently, the pension fund filed an Employee Retirement Income Security Act ("ERISA") withdrawal liability suit based on the identical alleged conduct. The District Court in this case held that the NLRB had primary jurisdiction and that the Court therefore lacked jurisdiction, but the Court of Appeals reversed. The questions presented for review are:

1. Whether, in light of the doctrine of NLRB primary jurisdiction, ERISA requires that an employer against whom withdrawal liability has been assessed must initiate arbitration of the pension fund's claim that the employer withdrew from the Fund even though the identical claim is pending before the NLRB in unfair labor practice proceedings.

2. Whether ERISA requires that legal issues of the arbitrator's jurisdiction must be submitted to arbitration rather than to a court for judicial determination.

3. Whether, contrary to the Tenth Circuit decision, the doctrine of equitable tolling applies to arbitration under ERISA, as determined by other courts of appeal.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties listed in the caption, the following fund trustees were parties to the proceeding before the United States Court of Appeals for the Tenth Circuit:

Bill Baker
Henry Beck
Dale Camblin
Paul E. Emrick
Max L. Flint
Jim Eatmon
Ed McCloskey
Joe Moring
Jerry Mullenback
Lee Overholt
Leon H. Land, Administrator
Darrell Raymond
Wesley Reichard
Larry Schaap
George Scholz
Mike Schreiber
Gary Schultz
Mike Trapp
Dennis Cole
Ray Pfeifer
Harold Taylor

Howard Systems, Inc. is the parent of Howard Electrical and Mechanical, Inc. There are no other parent or subsidiary companies.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT	ii
TABLE OF CASES AND STATUTES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
A. Background Labor Relations History	1
B. The NLRB Charges and Proceedings	3
C. The ERISA Claim	5
D. Trial Court Proceedings	7
E. The Tenth Circuit Decision	8
REASONS FOR GRANTING THE PETITION	9
A. The Tenth Circuit's Decision is Contrary to *Advanced Lightweight* and Other Decisions of this Court Establishing the Primary Jurisdiction of the NLRB, and Threatens Established National Labor Policy	9
1. The Decision Rejects the Primary Jurisdiction Doctrine	9
2. The Decision Conflicts with *Advanced Lightweight*	11
3. The Decision Threatens National Labor Policy	16

TABLE OF CONTENTS – Continued

Page

B. The Tenth Circuit, in Conflict With Other Circuits, Required the Employer to Submit the Legal Issue of the Arbitrator's Jurisdiction to Arbitration Rather than to Federal Court..... 17

C. The Tenth Circuit Decision Conflicts With the Decisions of Other Circuits and this Court Applying the Doctrine of Equitable Tolling .. 24

CONCLUSION 28

APPENDIX A1-A160

TABLE OF CASES AND STATUTES

Page

CASES:

Banner Indus., Inc. v. Central States, S.E. and S.W. Areas Pension Fund, 875 F.2d 1285 (7th Cir. 1989) .24, 25

C. Colteryahn Dairy v. Teamsters & Emp. Pension F., 847 F.2d 113 (3d Cir. 1988) 16

Carrier's Container Council v. Mobile S.A. Assoc., 896 F.2d 1330 (11th Cir. 1990)..... 19

Central States, S.E. and S.W. Areas Pension Fund v. T.I.M.E. D.C., Inc., 826 F.2d 320 (5th Cir. 1987) 19

Central Transport, Inc. v. Central States, S.E. and S.W. Areas Pension Fund, 816 F.2d 678 (6th Cir. 1986) (per *curiam* affirming 639 F. Supp. 788 (E.D. Tenn. 1986)), *cert. denied*, 484 U.S. 926, 108 S. Ct. 290, 98 L. Ed. 2d 250 (1987)..... 19

Cuyamaca Meats v. San Diego & Imperial Counties, Butcher and Food Employers' Pension Trust Fund, 827 F.2d 491 (9th Cir. 1987).....15, 22

DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983)..... 26

Dorn's Transp. v. Teamsters Pension Trust, 787 F.2d 897 (3d Cir. 1986) 21

Frye v. United Steel Workers of America, 767 F.2d 1216 (7th Cir. 1985), *cert. denied*, 474 U.S. 1007, 106 S. Ct. 530, 88 L. Ed. 2d 461 (1985)..... 15

Garner v. Teamsters Union, 346 U.S. 485, 74 S. Ct. 161, 98 L. Ed. 228 (1953) 10

TABLE OF CASES AND STATUTES – Continued

Page

Howard Electrical and Mechanical, Inc. and Plumbers Local Union No. 3, et al., and Pipefitters Local Union No. 208, et. al., 27-CA-8889, 27-CA-8889-2, and 27-CA-8924 and 27-CA-8924 (amended)..... 4

Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986)..... 10

Laborers Health and Welfare Fund v. Advanced Lightweight Concrete Company, 484 U.S. 539, 108 S. Ct. 830, 98 L. Ed. 2d 936 (1988)..... *passim*

Manhattan Eye, Ear & Throat Hospital, 300 NLRB No. 24, 135 LRRM 1177 (Sept. 28, 1990)..... 16

Martin v. Pullman Standard, 726 F.2d 101 (3d Cir. 1984)..... 27

Mason and Dixon Tank Lines v. Central States, etc., 852 F.2d 156 (6th Cir. 1988)..... 19

McKart v. United States, 395 U.S. 185, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969)..... 20

Myers v. Bethlehem Shipbuilding Corp., Ltd., 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638 (1938)..... 10

Park South Hotel v. New York Hotel Trades Council, 851 F.2d 578 (2nd Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 493, ___ L. Ed. 2d ___..... 20

Pullman-Standard v. Swint, 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)..... 27

Republic Indus., Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund, 718 F.2d 628 (4th Cir. 1983)..... 25

Robbins v. Pepsi-Cola Metro. Bottling Co., 636 F. Supp. 641 (N.D. Ill. 1986)..... 26

TABLE OF CASES AND STATUTES – Continued

Page

Roman Iron Works, 292 NLRB No. 142, 131 LRRM 1647 (Feb. 27, 1989) 16

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959) .10, 12

South Prairie Const. Co. v. Operating Eng's, 425 U.S. 800, 96 S. Ct. 1842, 48 L. Ed. 2d 382 (1976) (per *curiam*) 11

Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc., 698 F. Supp. 698 (W.D. Mich. 1987) 25

The Flying Tiger Line Inc. v. Central States, S.W. and S.E. Areas Pension Fund, 659 F. Supp. 13 (D. Del. 1986), *aff'd* 830 F.2d 1241 (3d Cir. 1987) 25

Trustees of the Chicago Truck Drivers, Helpers and Warehouse Worker's Union (Indep.) Pension Fund v. Chicago Kansas City Freight Line, Inc., 694 F. Supp. 469 (N.D. Ill. 1988) 25

Trustees of Chicago Truck Drivers, Helpers and Warehouse Workers' Union (Indep.) Pension Fund v. Central Trans., Inc., 888 F.2d 1161 (7th Cir. 1989) 25

United States v. Utah Const. & Min. Co., 384 U.S. 394, 86 S. Ct. 1545, 16 L. Ed. 2d 642 (1966) 15

TABLE OF CASES AND STATUTES – Continued

Page

STATUTES:

National Labor Relations Act, as amended:

29 U.S.C. §§ 158(a)(1) and (5) (NLRA §§ 8(a)(1) and (5)) 1, 4, 10, 11

29 U.S.C. § 159(b) 11

29 U.S.C. § 185(a) (NLRA § 301(a)) 11

Employee Retirement Income and Security Act, as amended:

29 U.S.C. §§ 1381-1405 ..... 1, 6, 15, 16

29 U.S.C. § 1254(1) 1

29 U.S.C. § 1381 13

29 U.S.C. § 1383(b) 6

29 U.S.C. § 1399(b)(2)(B) 6

29 U.S.C. § 1401(a) 6, 15

29 U.S.C. § 1451 ..... 1, 7

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit (App., *infra*, A1-A19) is reported at 909 F.2d 1379 (10th Cir. 1990). The opinion and order of the United States District Court for the District of Colorado (App., *infra*, A20-A25) was not published.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1990. The Court of Appeals denied petitioners' timely petition for rehearing on August 27, 1990. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(a)(1) and (5), and the Employee Retirement Income Security Act as amended by the Multiemployer Pension Plan Amendment Act of 1980, 29 U.S.C. §§ 1381-1405, and 1451 are set forth at App., *infra*, A142-A160.

STATEMENT

A. Background Labor Relations History

Howard Electrical and Mechanical, Inc. ("Howard") is a mechanical contractor situated in Denver, Colorado.

This case has resulted from a labor dispute between Howard and two unions representing Howard's construction unit employees, Plumbers Local No. 3 and Pipefitters Local No. 208 (collectively "unions"). Howard and the unions have been parties to collective bargaining agreements since 1952. Indeed, following much of the protracted labor dispute and litigation here, Howard and its two unions entered into a successor labor agreement dated July 2, 1988.

The most recent labor contract to which Howard was signatory with the two unions, prior to the dispute in issue, was effective May 1, 1981, through May 31, 1983. Prior to expiration of this agreement, Howard and the unions commenced bargaining negotiations, which continued into 1984.

Howard eventually presented a proposal to the unions dated June 19, 1984. This proposal suggested a number of changes in the contract provisions and the relationships between the parties. It excluded certain employees, "apprentices," from the bargaining unit, made revisions to the hiring hall procedures of the unions and gave Howard the right to hire employees without going through the hiring hall of the unions.[1] The June 19, 1984, proposal continued Howard's obligation to provide pension benefit payments to the Fund.[2] Later, however, on August 15, 1984, Howard submitted a new proposal

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[1] NLRB Decision, App., *infra*, A31.

[2] The Colorado Pipe Industry Pension Fund ("Fund") is a multiemployer pension fund within the meaning of ERISA established to provide retirement benefits for employees in the plumbing and pipefitting industry in Colorado.

which changed the benefit portion of its previous June 19, 1984, bargaining proposal. By identical letters dated August 15, 1984, Howard notified the unions with respect to the "health, welfare, vacation and other funds" provision of the previous proposal, that Howard was now adding the following language to its proposal:

> Each employee covered by this agreement shall be given the option to participate in the above plans [referring to the contract employee benefit and pension plans] subject to the approval of the trustees of the various funds, or to participate in the company's profit-sharing plan and major medical plan subject to the rules for eligibility provided for in said plans.[3]

Howard's letters to the unions stated that "if you do not accept this change by August 20, 1984," Howard will "presume that you have rejected the change and [ ] will implement it immediately."

Local No. 3 and Local No. 208 immediately responded to Howard's August 15, 1984, proposal by identical letters dated August 16, 1984, and August 20, 1984, rejecting the proposal and contending that Howard's August 15 letter contained proposals never previously discussed or negotiated with them.[4]

B. The NLRB Charges and Proceedings

On August 22, 1984, and August 28, 1984, the unions filed identical charges with the National Labor Relations

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[3] NLRB Decision, App., *infra*, A29-A30, n.2. *See also* the Administrative Law Judge Decision, App., *infra*, A72.

[4] *Id.*

Board (hereinafter "NLRB" or "Board") maintaining that Howard violated the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1). The unions claimed that Howard unilaterally revised the provisions of the employee pension, medical insurance and vacation programs by implementing its August 15, 1984, bargaining proposal without first bargaining to impasse.[5]

The NLRB issued a complaint, hearings were conducted in January 1987, and the administrative law judge issued his decision on April 8, 1987. In his decision, the ALJ concluded that there was insufficient evidence in the proceeding before him to establish that Howard had in fact implemented its August 15, 1984, proposal, and therefore, he recommended that the complaint be dismissed "insofar as it encompasses this allegation."[6]

The NLRB agreed and adopted the decision of the ALJ on this issue:

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[5] Charges No. 27-CA-8924, and 27-CA-8889-2, respectively. On September 25, 1984, Local No. 208 in Case No. 27-CA-8924 filed an amended charge alleging that Howard since February of 1984 had continued to violate §§ 8(a)(5) and (1) of the Act by unilaterally changing wages, working conditions and terms of employment for employees. The parties subsequently, in October 1984, entered into a settlement agreement which was filed with the NLRB, whereunder the parties believed they had resolved these claims. Subsequently, however, a dispute arose as to the nature of the parties' obligations under this settlement agreement, and the understandings of the parties as to what had been settled. The NLRB Regional Director then set aside the settlement agreement and issued a complaint based on the previously filed unfair labor practice charges.

[6] Administrative Law Judge's Decision, App., *infra*, A117.

> The complaint alleges that [Howard] violated Sec. 8(a)(5) and (1) by unilaterally changing the unit employees' benefits when it implemented its August 15, 1984 proposal without affording the Unions an opportunity to bargain about the matter. The judge dismissed this allegation because there was insufficient evidence to establish that [Howard], in fact, had implemented its August proposal. The General Counsel excepts to this dismissal. In agreeing with the judge, we note that the General Counsel does not dispute that the evidence did not show actual implementation, but, rather, she incorrectly relies on the [Howard's] announced intent to implement the proposal as establishing the unilateral implementation. [citing cases].

See App., *infra*, A29-A30. The NLRB decision is on appeal to the Tenth Circuit; however, the precise issue of non-implementation of the August 15, 1984 proposal, as determined by the NLRB, is not in issue in that appeal. The fact that the proposal was never implemented in now undisputed.

C. The ERISA Claim.

The collective bargaining agreements between Howard and the unions required Howard to make contributions on behalf of its unit employees to the Fund. In May 1986, in the midst of the protracted labor dispute, the Fund issued a withdrawal liability notice letter to Howard, asserting that Howard had ceased contributions to the Fund and that the negotiations with the unions had reached "impasse."[7] Howard disputed the Fund's claims.

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[7] Counsel for the unions during the negotiations with Howard was also counsel for the Fund in the related ERISA proceedings.

Thereafter, as is required under ERISA, 29 U.S.C. § 1399(b)(2)(B), the Fund responded by letter dated September 20, 1986, wherein its legal position on Howard's alleged withdrawal liability was presented. The Fund's counsel claimed that withdrawal liability was based on the alleged "impasse" in collective bargaining that occurred on or about August 15, 1984, when Howard allegedly implemented changes in benefits which included "the cessation of any payments of pension benefits."[8] Because that issue was pending before the NLRB, Howard did not seek arbitration of the union's withdrawal liability claim under ERISA, 29 U.S.C. § 1401(a).

Later, the Fund filed a complaint in federal district court, seeking to obtain a judgment for withdrawal liability. The Fund alleged that Howard unilaterally implemented its August 15, 1984, proposal "on or about August 20, 1984, at which time it ceased its obligation to the Fund except with respect to two of its employees, both of whom were terminated by the defendant on December 31, 1984." Amended Complaint, ¶ 16. The Fund alleged that this unilateral implementation of the proposal constituted "withdrawl from the multiemployer pension plan as withdrawal is defined by Sec. 4203(b) of ERISA [29 U.S.C. § 1383(b)]." Amended Complaint, ¶ 17. The Fund averred that it was entitled to a judgment against Howard for unpaid withdrawal liability under

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[8] The Fund's counsel (who is also the unions' labor counsel) continued other argument in the letter asserting the NLRB action in rescinding the Settlement Agreement was further ground for the Fund's withdrawal claim. This assessment position does not involve any technical issue under ERISA, 29 U.S.C. §§ 1381-1399.

ERISA, 29 U.S.C. § 1451. The Fund contended that Howard waived all defenses to withdrawal liability for failing to demand ERISA arbitration of the issue of proposal implementation pending before the NLRB. Amended Complaint, ¶ 20.

Howard answered denying that the trial court had jurisdiction over the matter and asserting that the withdrawal liability proceedings were an impermissible attack on the previously invoked primary jurisdiction of the NLRB. Howard also defended on the ground it had not withdrawn from the plan. Answer to Amended Complaint, First Defense, ¶ 1, and Third and Sixth Defenses.

D. District Court Proceedings

The parties filed cross-motions for summary judgment. The District Court, relying on this Court's decision in *Laborers Health and Welfare Fund v. Advanced Lightweight Concrete Company*, 484 U.S. 539, 108 S. Ct. 830, 98 L. Ed. 2d 936 (1988), granted Howard's motion, holding that the NLRB possessed exclusive jurisdiction over the labor issue upon which the Fund's withdrawal liability claim was predicted. The District Court held:[9]

> The unfair labor practice charges brought by the unions directly relate to, and indeed control, the question of whether there was a permanent underlying termination of an obligation to contribute under the plans within the meaning of 29 U.S.C. § 1383. It is this court's conclusion that the enactment of the requirement for arbitration

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[9] *See* District Court opinion, App., *infra*, A23.

> in Section 1401(a) was not intended to supersede or supplant the authority of the NLRB under the NLRA and that the unfair labor practice charges brought by the unions and still pending before the NLRB are matters for which the NLRB has exclusive jurisdiction and preclude this court from proceeding in this matter.[10]

Since the District Court granted Howard's motion for summary judgment and held that the NLRB had jurisdiction over the matter, it did not rule upon the Fund's motion.

E. The Tenth Circuit Decision

The Tenth Circuit reversed. It held that the District Court had jurisdiction, that the NLRB primary jurisdiction doctrine was not applicable, and that Howard had waived all defenses to withdrawal liability by failing to initiate ERISA arbitration of the claim that it had withdrawn from the Fund by implementing the bargaining proposal. Rather than remanding this case for further proceedings in the District Court, the Tenth Circuit remanded the case with instructions that the District Court enter judgment in favor of the Fund. The Tenth Circuit admitted that its decision was "draconian" because the NLRB had by that time held that Howard's

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[10] *Id.* At the time the District Court issued its decision, only the initial decision of the administrative law judge of the NLRB had been rendered. It is for this reason that the District Court referred to the NLRB proceedings as "pending." The NLRB charges had been filed and were pending some two years before the withdrawal liability claim of the Fund was filed.

bargaining proposal had not been implemented, and thus, the triggering event for ERISA withdrawal liability had never occurred.

REASONS FOR GRANTING THE PETITION

A. The Tenth Circuit's Decision is Contrary to *Advanced Lightweight* and Other Decisions of this Court Establishing the Primary Jurisdiction of the NLRB, and Threatens Established National Labor Policy.

1. The Decision Rejects the Primary Jurisdiction Doctrine.

The unprecedented Tenth Circuit decision disregards the longstanding doctrine that the NLRB is vested with primary jurisdiction to adjudicate NLRA labor dispute issues. The decision announces a rule that even though pending NLRB proceedings join the exact labor law issues upon which the assertion of withdrawal liability is based, the NLRB simply does not have primary jurisdiction to decide the issues. Rather, the decision holds that labor law issues must be simultaneously presented to an ERISA arbitrator, who has no labor law expertise, and that the NLRB and ERISA arbitration proceedings must then proceed on parallel tracks, with an obvious waste of private and judicial resources and with considerable risk of inconsistent decisions. The decision concludes that notwithstanding the NLRB's decision holding that Howard did not implement the proposal, and thus, did not withdraw, Howard must pay a $555,000 windfall to the Fund as a penalty for not initiating duplicative arbitration of that issue.

The Tenth Circuit decision, rejecting the doctrine of primary jurisdiction, conflicts with the historic decisions of this Court espousing the rule of tribunal deference to the primary jurisdiction of the NLRB. *See, e.g., Myers v. Bethlehem Shipbuilding Corp., Ltd.*, 303 U.S. 41, 50-51, 58 S. Ct. 459, 82 L. Ed. 638, 644 (1938) (jurisdiction of the NLRB under the Act is exclusive and must be exhausted before any other judicial relief may be sought); *Garner v. Teamsters Union*, 346 U.S. 485, 490-91, 74 S. Ct. 161, 98 L. Ed. 228, 239-40 (1953) (Congress established a rule for "any tribunal competent to apply law generally to the party." That rule precludes determinations in "labor controversies" by a "multiplicity of tribunals" and confides primary jurisdiction for same to the NLRB); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775, 783 (1959) (state and federal courts "must defer" to the primary jurisdiction, the "exclusive competence" of the NLRB, when an activity is arguably subject to Section 7 or 8 of the act [Unfair Labor Practice Section 8(a)(5), as in the instant case here] if the "danger" of interference with national labor policy is to be averted); *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 391, 106 S. Ct. 1904, 90 L. Ed. 2d 389, 401 (1986) ("Since *Garmon* . . . we have also reaffirmed . . . a determination that in enacting the NLRA, Congress intended for the Board generally to exercise exclusive jurisdiction in this area").

This Court has previously ruled in another labor relations act context, NLRA Section 301, that once the NLRB has already assumed initial jurisdiction but has not yet made a ruling, federal courts are precluded from

assuming jurisdiction. *See South Prairie Const. Co. v. Operating Eng's*, 425 U.S. 800, 96 S. Ct. 1842, 48 L. Ed. 2d 382 (1976) (per *curiam*). In that case, this Court held that a federal circuit court lacked jurisdiction, on appeal of an NLRB decision, to make an initial determination of which set of employees constituted the appropriate bargaining unit under the NLRA, 29 U.S.C. § 159(b). This Court held that the case must be remanded to the NLRB for its initial determination. There is no conceptual distinction between district court initial consideration of an NLRA representational issue under § 301(a) and consideration of an NLRA unfair labor practice issue under § 8(a)(5). Both fall within the primary jurisdiction rule.

2. The Decision Conflicts with *Advanced Lightweight.*

The Tenth Circuit decision, furthermore, is in conflict with this Court's opinion in *Advanced Lightweight, supra,* upon which the district court relied in dismissing the case. This Court there discussed the accommodation that Congress and the courts require between the NLRA and ERISA. This Court carefully instructed that in any case involving previously filed unfair labor practice charges, ERISA procedures will normally defer to the primary jurisdiction of the NLRB under the federal labor policy:

> [W]hether an employer's unilateral decision to discontinue contributions to a pension plan [permanent withdrawal] constitutes a violation of the statutory duty to bargain in good faith is the kind of question that is routinely resolved by the administrative agency with expertise in labor law. There are situations in which district

> judges must occasionally resolve labor issues, but they surely represent the exception rather than the rule. In cases like this [post-contract expiration, labor law cases] which involve either an actual or an "arguable" violation of § 8 of the NLRA, federal courts typically defer to the judgment of the NLRB. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).[19]

484 U.S. at 552.[11] *Advanced Lightweight* involved delinquent contributions, and not withdrawal liability. Nevertheless, this Court made it clear that ERISA claims involving contested unfair labor practice charges, even in the context of withdrawal liability claims, would be subject to the primary jurisdiction of the NLRB. The Tenth Circuit's opinion is thus in direct conflict with this Court's careful instructions in *Advanced Lightweight*.

The danger of parallel NLRB and ERISA proceedings, which join the exact same labor law issue, can be no better demonstrated than by the facts of this case. Here,

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[11] This Court continued as follows in footnote 19:

> It is true, as petitioners point out, that district courts may find it necessary to decide whether an impasse occurred in withdrawal liability cases in which there is a dispute over the date of withdrawal. In such a proceeding, however, there would not normally be any *claim that the employer was guilty of an unfair labor practice* or that liquidated damages were mandated because the employer misjudged the impasse date. (Emphasis added.)

This Court's instructions show that when there is a "claim that the employer was guilty of unfair labor practice," the district court should defer to the primary jurisdiction of the NLRB. The District Court here followed these instructions but was reversed for doing so.

the NLRB proceedings were initiated by unfair labor practice charges in 1984, which went to hearing in 1987. The ERISA withdrawal liability notice letter to Howard was issued in May 1986, long after the NLRB jurisdiction had been invoked. Arbitration here would have to have been invoked in 1986, years before the Board issued its final decision in 1989. The arbitrator would have heard and decided the case of whether Howard had implemented its bargaining proposal, notwithstanding the previously invoked Board procedures, at the time when no NLRB decisions had been entered.

The Tenth Circuit simply ignored the NLRB's primary jurisdiction here, despite that Court's acknowledgement that the only source of any "obligation" of Howard to pay ERISA withdrawal liability was under the NLRA, App., *infra,* A10. It erroneously distinguished this Court's decision in *Advanced Lightweight, supra,* on the alleged ground it was limited to:

> The narrow category of suits seeking recovery of unpaid [noncontractual] contributions accrued during the period between contract expiration and [bargaining] impasse.

App., *infra,* A13. *Advance Lightweight* is not so limited; instead, this Court's instructions explicitly apply to withdrawal liability cases as well. *Id.* 484 U.S. at 552 and n. 19.

The Tenth Circuit did not further review the issue of the NLRB's primary jurisdiction. Instead it held that the withdrawal liability claim "rests upon a separate cause of action specially created by Congress, 29 U.S.C. § 1381." App., *infra,* A13. That holding conflicts with the Court's own previous statement that Howard's "obligation," if

any, was derived solely under the NLRA. It also is simply wrong, as this Court carefully instructed in its decision in *Advanced Lightweight, supra*. This Court instructed that the withdrawal liability claim is grounded solely on the NLRA-created cause of action. First, that withdrawal liability (specifically not referring to delinquent payments liability) in the post-contract period may arise only on a duty created under "applicable labor-management relations law." *Advanced Lightweight, supra*, 484 U.S. at 546, 549, ns. 11 and 16. That duty is part of a "broader labor law duty" which was "created to protect the collective bargaining process." *Id.* at 553. The withdrawal liability statute makes this clear itself, this Court stated, in § 4212(a), 29 U.S.C § 1392(a).[12] *Id.* at 546, n. 11.

Thus, as this Court held, the NLRA basis for the subsequently raised ERISA claim requires application of the doctrine of the NLRB's primary jurisdiction when previously filed unfair labor practice charges indicate "a good-faith dispute over both the existence and extent of the employer's liability" in the context of an alleged "violation of the statutory duty to bargain in good faith." *Id.* at 552.

Paradoxically, the Court of Appeals concluded that the District Court correctly found that the NLRB findings would control a withdrawal liability claim before an ERISA arbitrator, and that "both the arbitrator and the district court on review would be obligated to accord *collateral estoppel* effect to the NLRB's findings." App., *infra*, A17. However, the Tenth Circuit also held that the

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[12] App., *infra*, A147.

arbitrator in that instance would still have discretion to proceed with the arbitration while the NLRB proceedings were pending. Here, accordingly, no *collateral estoppel* effect could be given. No NLRB decisions had yet been entered.[13] There could be no deferral to the NLRB. The NLRA issues, including the issue of whether the NLRB had primary jurisdiction, would have been effectively subjugated to a decision by an arbitrator with no expertise in the developing national labor law and policy. This is the very conflict between tribunals that the NLRB primary jurisdiction doctrine was designed to avoid.[14]

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[13] Since no NLRB decision existed at the time, *collateral estoppel* could not have been applied. To be given *collateral estoppel* effect the agency decision must be "final and conclusive." *United States v. Utah Const. & Min. Co.*, 384 U.S. 394, 420, 86 S. Ct. 1545, 16 L. Ed. 2d 642, 660 (1966); *Frye v. United Steel Workers of America*, 767 F.2d 1216, 1220-1221 (7th Cir. 1985), *cert. denied*, 474 U.S. 1007, 106 S. Ct. 530, 88 L. Ed. 2d 461 (1985) (*collateral estoppel* effect properly given to NLRB decision on issues "actually litigated and determined by a valid and final judgment," citing 1 *Restatement (Second) of Judgments* 827 (1982)).

[14] Unlike the Tenth Circuit, the Ninth Circuit has properly recognized the NLRB's primary jurisdiction when it affirmed the district court's decision which adopted the NLRB's determinations to resolve a related withdrawal liability claim under ERISA, *without arbitration*. *See Cuyamaca Meats v. San Diego & Imperial Counties, Butcher and Food Employers' Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987).

The issue of NLRB primary jurisdiction neither arises under ERISA nor falls within its arbitration provisions. ERISA, 29 U.S.C. § 1401, requires arbitration of "any dispute" under particular sections of ERISA, 29 U.S.C. §§ 1381-1399. *See* App., *infra*, A142-A158. Those sections set forth "technical

(Continued on following page)

3. The Decision Threatens National Labor Policy.

The withdrawal liability claim was simply a punitive weapon filed during and as a part of the labor dispute. The Fund's counsel, who was also the unions' counsel, claimed that the "determination of withdrawal liability" for Howard was based on the alleged "unilateral implementation" of the "August 15, 1984" proposal. The claim was an effort to circumvent NLRB procedures and established remedies and to force ERISA withdrawal liability penalties for alleged unfair labor practice conduct, despite the NLRB's pending jurisdiction and its subsequent finding that no such unlawful conduct occurred.[15] The Tenth Circuit decision gives unions and their allied

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provisions" describing "how and when withdrawal liability is to be assessed." *C. Colteryahn Diary v. Teamsters & Emp. Pension F.*, 847 F.2d 113, 118 (3d Cir. 1988). They cover sales of assets, adjustments for partial withdrawals, di minimus exceptions, suspension of contributions, and various "accepted methods for calculating the assessment itself." *Id.* In *C. Colteryahn Dairy*, ERISA arbitration was excused in the context of a claim that an employer was fraudulently induced to participate in a fund, since the issue did not involve a "determination made under" the cited ERISA provisions. Similarly, a dispute concerning the NLRB's primary jurisdiction is not a dispute about matters covered by 29 U.S.C. §§ 1381-1399. The interplay between those provisions and the NLRA was resolved in favor of the NLRB's primary jurisdiction in *Advanced Lightweight*, 484 U.S. at 552.

[15] Undisputedly, the NLRB has the power to remedy employer unlawful collective bargaining conduct in refusing to continue contributions to the Funds. *See Advanced Lightweight, supra*, 484 U.S. at 552-553; *Manhattan Eye, Ear & Throat Hospital*, 300 NLRB No. 24, 135 LRRM 1177 (Sept. 28, 1990); *Roman Iron Works*, 292 NLRB No. 142, n. 15, 131 LRRM 1647 (Feb. 27, 1989).

pension funds a weapon not intended under ERISA and plainly inconsistent with the NLRA, to force small employers like Howard to agree to their demands at the bargaining table or face results which the Tenth Circuit itself terms "draconian." This interference with national labor policy cannot be permitted. As this Court stated in *Advanced Lightweight,* the ERISA procedures were not "provided" by Congress as another way to obtain "redress for an employer's [alleged] violation of its duty to bargain with the union." 484 U.S. at 553.[16] Review by this Court is necessary to preserve the primary jurisdiction of the NLRB and to prevent this disruption of labor relations and collective bargaining throughout the United States.

B. The Tenth Circuit, in Conflict With Other Circuits, Required the Employer to Submit the Legal Issue of the Arbitrator's Jurisdiction to Arbitration Rather than to Federal Court.

The Tenth Circuit decision creates a new mandatory ERISA arbitration standard which is harsh, rigid and inflexible. This new absolute bar rule, moreover, conflicts with decisions of other Courts of Appeal in not applying exceptions to the exhaustion of administrative remedies doctrine. The Tenth Circuit denied Howard's Petition For Rehearing which requested application of exceptions to

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[16] Congress in enacting the MPPAA amendments to ERISA expressly authorized an employer to suspend fund contributions during a labor dispute with its employees, which is further evidence that ERISA was not intended to provide additional weapons to unions and their allied pension funds during labor disputes. *See* 29 U.S.C. § 1398(2).

exhaustion in view of the Court's unprecedented decision, and which requested remand to the District Court for that purpose. The Tenth Circuit instead blindly adhered to arbitration despite conflicting decisions of other appellate courts holding that arbitration in these circumstances does not advance any significant ERISA policy and is not required. The decision simply produces a "draconian" penalty to Howard and a $555,000 windfall to the Fund for a claimed withdrawal which the NLRB has held did not occur.

The Tenth Circuit decision expressly recognized that ERISA arbitration "is not an absolute jurisdictional bar." App., *infra*, A14. But the Court, in conflict with decisions of other appellate courts excusing the exhaustion of that administrative remedy, held that arbitration here indeed was an absolute bar to Howard's right to defend the ERISA complaint. "[A]rbitration reigns supreme," the Court held, App., *infra*, at A15, and:

> By failing to arbitrate, an employer thus waives any defenses to collection actions [for asserted ERISA withdrawal liability] that could properly have been heard before the arbitrator.

App., *infra*, A15.

Contrary to the Tenth Circuit's admonition that "arbitration reigns supreme," other appellate courts have held that when legal issues concern a jurisdictional question (in the context of statutory interpretation) the issue need not be submitted to arbitration. *See Central Transport, Inc. v. Central States, S.E. and S.W. Areas Pension Fund*, 816 F.2d 678 (6th Cir. 1987) (per *curiam* affirming 639 F. Supp. 788 (E.D. Tenn. 1986)), *cert. denied*, 484 U.S. 926, 108 S. Ct. 290, 98 L. Ed. 2d 250 (1987); *Mason and*

Dixon Tank Lines v. Central States, etc., 852 F.2d 156, 167 (6th Cir. 1988) (jurisdictional issue whether the company was a covered employer under ERISA was held not arbitrable); *Carrier's Container Council v. Mobile S.A. Assoc.*, 896 F.2d 1330, 1345 (11th Cir. 1990) (where the court affirmed the summary judgment decision of the trial court on the merits of withdrawal claim in a declaratory judgment action, holding that jurisdictional issue of employer status was not within arbitration expertise, arbitration would not serve goal of judicial economy, and arbitration would not help develop the factual record). The same result obtains for "facial constitutional attack," or even a "verifiable claim of irreparable injury." *See Mason and Dixon Tank Lines, supra*, at 165. *See also Central States, S.E. and S.W. Areas Pension Fund v. T.I.M.E. D.C., Inc.*, 826 F.2d 320, 327-328 (5th Cir. 1987).

In other legal contexts, federal appellate courts also recognize exceptions to the duty to exhaust the "administrative remedy" of ERISA arbitration.[17] In *Park*

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[17] The exhaustion of remedies analysis which is the standard for measuring ERISA arbitration requirements can be significantly traced to this Court's decision in *McKart v. United States*, 395 U.S. 185, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969). *McKart* was a Selective Service Act case involving "premature" resort to the courts and petitioner's failure to appeal his Selective Service reclassification. This Court refused to apply the exhaustion doctrine and held the failure to appeal did not bar petitioner's court challenge to the validity of his reclassification. This Court in its decision announced rationales supporting the exhaustion doctrine, failing which the doctrine would not be applied:

(Continued on following page)

South Hotel v. New York Hotel Trades Council, 851 F.2d 578 (2nd Cir. 1988), *cert. denied*, 488 U.S. 966, 109 S. Ct. 493, 102 L. Ed. 2d 530 (1988), a partnership was signatory to a labor agreement which required it to contribute to a multiemployer pension fund. When the partnership later sold its interest to a successor (Donald Trump), who continued to recognize the union and labor agreement, and who continued payments to the fund, the fund contended that the mere sale of partnership interest was a withdrawal under ERISA. The parties did not seek arbitration, and instead litigated the issue in federal district court. The court held the sale constituted a withdrawal, but the Court of Appeals reversed. It did affirm the district court, however, in concluding that ERISA arbitration was not required:

> In the present case, we conclude that exhaustion of the arbitration remedy is not required because (1) this case presents no factual issues but only legal questions of statutory interpretation, (2) the parties agreed that arbitration was

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(1) Avoidance of premature interruption of the administrative process;

(2) Deference to application of special agency expertise;

(3) Deference to administrative autonomy – to allow the agency to have first opportunity to correct its own errors;

(4) Development of the factual record by the agency.

395 U.S. at 193-195. Not one of these exhaustion requirements is applicable here.

> not required, (3) the suit was filed before the time for invoking arbitration had expired, and (4) judicial economy would not be served by remanding the case at this late stage for arbitration, which almost certainly would be followed by further judicial proceedings.

851 F.2d at 582. Here, the case similarly presents such a legal issue, Howard was already litigating the case before the NLRB, the proper forum, when the alleged arbitration duty arose, and thus was timely proceeding in that forum. Judicial economy would not have been served by arbitration, since the NLRB already had the case, and further judicial proceedings certainly would have followed any arbitration.

Similarly, in *Dorn's Transp. v. Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986), the employer sold its stock to another employer that assumed its operations and employees, and continued fund payments through the purchasing employer's own labor agreement involving the identical pension fund. The Court held that the legal issue of the effect of this sale for ERISA withdrawal liability purposes was not subject to arbitration. In affirming the district court's decision in the declaratory judgment action, the appellate court held:

> . . . [T]here is no *per se* exhaustion requirement under which this court lacks jurisdiction to hear cases that have not first been before an arbitrator.

787 F.2d at 903. The court continued that where arbitration "would be of little use," such as an issue where the arbitrator would not have "special expertise," or where arbitration would not "moot further proceedings" and would not serve the goal of "judicial economy," and

would not "help develop a fuller factual record" to assist the court, then "arbitration may be bypassed. . . . " 787 F.2d at 903. The court concluded:

> As this was a rare case in which there was no need for the development of a factual record, we do not believe the district court abused its discretion in . . . bypassing arbitration.

Id.[18]

What this case has in common with these other cases in which arbitration has been excused is that arbitration would not further any purpose underlying the doctrine of exhaustion of administrative remedies. In this case, arbitration would not assist in developing a factual record utilizing any special expertise of an arbitrator which would moot any further proceedings and result in judicial economy. The District Court here could resolve the jurisdictional issue without any need for further factual proceedings, and indeed, in recognition of the pending administrative proceedings which would be "on the record" before the NLRB. The arbitrator here had no special expertise in the context of this NLRB primary jurisdictional issue, and arbitration would certainly not promote judicial economy. Indeed, arbitration would simply proliferate a third tribunal to hear the case and raise the clear risk of inconsistent decisions. In direct conflict,

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[18] *See also Cuyamaca Meats v. San Diego & Imperial Counties, Butcher and Food Employers' Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987) when the court, without arbitration, relied upon the prior NLRB determination to supply the factual basis for proper withdrawal date determinations.

the Tenth Circuit decision precludes this reliance on the NLRB's jurisdiction and decision.

The Tenth Circuit decision precludes any use in this case of any exception to the exhaustion doctrine. Contrary to the cited decisions of appellate courts which squarely recognize exceptions to the exhaustion doctrine under ERISA, the Tenth Circuit has blindly adopted a harsh, rigid rule that Arbitration Reigns Supreme and is an absolute jurisdictional bar to Howard's recognized ERISA jurisdictional defense. Indeed, the NLRB decision conclusively, irrefutably, establishes Howard's defense that it did *not* implement the bargaining proposal, that the triggering event for withdrawal liability did *not* occur, and that Howard did not withdraw from the Fund. No better case calling for an exception to the exhaustion doctrine can be imagined than the undisputed facts of this case.

Here, the legal issue of the NLRB's primary jurisdiction squarely met the exceptions noted to application of the exhaustion of remedies doctrine. Howard was already litigating the issue before the NLRB when the withdrawal liability claim was asserted, and was timely exercising its NLRB defenses. The Tenth Circuit need not have created its new rule of absolute jurisdictional bar but, rather, should have followed the existing law developed by the federal appellate courts and simply excused arbitration.

C. The Tenth Circuit Decision Conflicts With the Decisions of Other Circuits and this Court Applying the Doctrine of Equitable Tolling.

The appellate courts have also agreed on another doctrine excusing arbitration, namely, the doctrine of

equitable tolling. Under this doctrine, arbitration of withdrawal liability is deferred or delayed, pending resolution of issues not suited for ERISA arbitration in another appropriate forum. For example, in *Banner Indus., Inc. v. Central States, S.E. and S.W. Areas Pension Fund*, 875 F.2d 1285 (7th Cir.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 563, 107 L.Ed.2d 558 (1989), an employer assessed with withdrawal liability by the fund did not demand ERISA arbitration. Instead, the employer filed a declaratory action in district court, a proper forum for such litigation in the employer's view, arguing that it was not an "employer" subject to the arbitrator's jurisdiction. The federal court eventually held that the "employer" issue is itself subject to arbitration under ERISA, and that the employer should have invoked arbitration. The Court of Appeals for the Seventh Circuit nevertheless upheld the district court's determination that the arbitration period should be equitably tolled:

> [T]he issues presented question the arbitrator's authority to bind the parties. When the question is whether one of the parties falls within the arbitrator's jurisdiction, fairness considerations mandate that the deadline for arbitration be tolled until determination is made that the party is subject to mandatory arbitration. The district court recognized that this Banner issue had not been definitively decided previously.

875 F.2d at 1291-1292. *See Republic Indus., Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 644 (4th Cir. 1983) (arbitration period equitably tolled when employer made a "not frivolous" challenge to constitutionality of statute and jurisdiction of arbitrator); *The Flying Tiger Line Inc. v. Central States, S.W. and S.E. Areas*

Pension Fund, 659 F. Supp. 13 (D. Del. 1986), *aff'd* 830 F.2d 1241, 1246-1247, 1256 (3d Cir. 1987) (arbitration period equitably tolled in declaratory action in federal court where company argued it was not an "employer" in federal court and contended that its status as "employer" should be judicially determined, even though claim was rejected and arbitration was ordered); *Trustees of Chicago Truck Drivers, Helpers and Warehouse Workers' Union (Indep.) Pension Fund v. Central Trans., Inc.*, 888 F.2d 1161, 1165 (7th Cir. 1989) (trustees' filing of claim in bankruptcy equitably tolled the period in which the employer was required to demand arbitration of subsequently asserted withdrawal liability claim, even though the trustees, and not the employer filed the claim in bankruptcy, and where arbitration was never initiated and no separate court action to contest arbitration was ever filed).[19]

The decision of the Tenth Circuit significantly conflicts with these decisions of other appellate courts

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[19] The equitable tolling doctrine has also been applied by a number of district courts in the context of ERISA. *See Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc.*, 698 F. Supp. 698 (W.D. Mich. 1987) (equitable tolling applied to ERISA arbitration requirement); *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Worker's Union (Indep.) Pension Fund v. Chicago Kansas City Freight Line, Inc.*, 694 F. Supp. 469 (N.D. Ill. 1988) (arbitration period equitably tolled even though employer did not file declaratory judgment action in federal court); *Robbins v. Pepsi-Cola Metro. Bottling Co.*, 636 F. Supp. 641, 679 n. 53 (N.D. Ill. 1986) (challenge to constitutionality of ERISA in federal court did not result in waiver of right to invoke ERISA arbitration).

holding that arbitration may be tolled in difficult cases like this.

After the Tenth Circuit issued its decision, Howard petitioned for rehearing, arguing that, at a minimum, the Tenth Circuit should remand the case to the District Court to allow it to consider whether the doctrine of equitable tolling should be applied given the unique facts of this case and the Court's unprecedented decision regarding the NLRB's primary jurisdiction. *See* App., *infra*, A121-141. The Tenth Circuit, however, after requesting that the Fund file a reply brief, summarily and without comment denied Howard's petition. *See* App., *infra*, A119. It remanded the case with directions that the District Court enter judgment in favor of the Fund. In so doing, the Tenth Circuit *sub silento* rejected the doctrine of tolling in the context of ERISA, creating a conflict with every other circuit which has considered the issue.

The proper appellate disposition when a question of equitable tolling has not been addressed by the district court is to remand the matter for further proceedings in that court. In *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 172, 103 S. Ct. 2281, 2294, 76 L. Ed. 2d 476, 494 (1983), this Court held:

> Petitioner DelCostello contends, however, that certain events operated to toll the running of the statute of limitations until about three months before he filed suit. Since the district court applied a 30-day limitations period, it expressly declined to consider any tolling issue. 524 F. Supp. at 725. Hence, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

See also Pullman-Standard v. Swint, 456 U.S. 273, 291, 102 S. Ct. 1781, 72 L. Ed. 2d 66, 81-82 (1982); *Martin v. Pullman*

Standard, 726 F.2d 101, 102 (3d Cir. 1984) (district court's failure to determine if equitable tolling applied required appellate remand for consideration of said issue).

The Tenth Circuit need not have issued the decision creating a new harsh rule of absolute jurisdictional bar. In light of its decision on the merits, the Tenth Circuit should have adopted the doctrine of equitable tolling and remanded the matter to the District Court for review. By this procedure, a decision in conflict with other appellate courts would have been avoided and the "draconian" penalty of a "default" payment to the funds of some $555,000 where no withdrawal in fact occurred would not have resulted.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

October Term, 1990

HOWARD ELECTRICAL & MECHANICAL, INC., and HOWARD SYSTEMS, INC.,

Petitioners,

v.

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

Page

United States Court of Appeals for the Tenth Circuit Decision A1

United States District Court Decision A20

National Labor Relations Board Decision A27

National Labor Relations Board Administrative Law Judge Decision A50

Tenth Circuit Order on Petition for Rehearing and Suggestion for Rehearing *in Banc* A119

Petition for Rehearing and Suggestion for Rehearing *in Banc* A121

Statutory Provisions:

NLRA §§ 8(a)(1) and (5), 29 U.S.C. § 158(a)(1) and (5) A142

ERISA 29 U.S.C. § 1381 ..... A142-143

ERISA 29 U.S.C. § 1382 ..... A143

ERISA 29 U.S.C. § 1383 ..... A144-147

ERISA 29 U.S.C. § 1392 ..... A147-148

ERISA 29 U.S.C. § 1399 ..... A149-155

ERISA 29 U.S.C. § 1401 ..... A155-158

ERISA 29 U.S.C. § 1451 ..... A159-160

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, an express trust,

Plaintiff-Appellant,

and

TRUSTEES OF COLORADO PIPE INDUSTRY INSURANCE TRUST, an express trust; PLUMBERS LOCAL UNION NO. 3, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; and PIPEFITTERS LOCAL NO. 208, United Association of Journeymen and Apprentices of the Plumbing and Pipefittings Industry of the United States and Canada,

Plaintiffs,

vs.

HOWARD ELECTRICAL & MECHANICAL INC., a Colorado Corporation; and HOWARD SYSTEMS, Inc., a Colorado Corporation,

Defendants-Appellees,

and

JACORE, INC., a Colorado Corporation,

Defendant.

No. 88-2938

Filed
MAY 18 1990

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 86-M-2561

James C. Fattor, of Hornbein, MacDonald, Fattor & Hobbs, Denver, Colorado, for Plaintiff-Appellant.

Early K. Madsen, of Bradley, Campbell & Carney, Golden, Colorado, for Defendants-Appellees.

Before SEYMOUR and BALDOCK, Circuit Judges, and SEAY, District Judge.*

BALDOCK, Circuit Judge.

Plaintiff-appellant trustees sought to collect withdrawal liability from defendant-appellee employer for the unions' multiemployer pension fund. The district court dismissed the action for lack of jurisdiction. We hold that the district court had jurisdiction to adjudicate the plaintiff's claim for withdrawal liability, and that the defendants waived their defenses to withdrawal liability by failing to arbitrate. Our jurisdiction over this appeal arises under 28 U.S.C. § 1291. We reverse with instructions to enter summary judgment for the plaintiff.

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* The Honorable Frank H. Seay, Chief Judge, United States District Court for the Eastern District of Oklahoma, sitting by designation.

I.

The Colorado Pipe Industry Pension Fund (the fund) is an express trust established to provide retirement benefits for employees in the plumbing and pipefitting industry in the State of Colorado. The fund operates a multiemployer pension plan[1] as defined under the Employment Retirement Income Security Act, 29 U.S.C. §§ 1001-1462 (ERISA). Defendant-appellee Howard Systems, Inc. is the parent of wholly-owned subsidiary and defendant-appellee Howard Electrical & Mechanical, Inc. (Howard), a Colorado corporation engaged in the construction business. This action between Howard and the trustees arises out of a labor dispute between Howard and Plumbers Local Union No. 3 and Pipefitters Local Union No. 208 (the unions). In our disposition of the instant case, we consider both the dispute between Howard and the unions and the dispute between Howard and the trustees.

---

[1] ERISA defines a multiemployer plan as follows:

> The term 'multiemployer plan' means a plan –
>
> (i) to which more than one employer is required to contribute,
>
> (ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and
>
> (iii) which satisfies such other requirements as the Secretary may prescribe for regulation.

29 U.S.C. § 1002(37)(A)

Unions' Unfair Labor Practices Action

In May 1981, Howard executed collective bargaining agreements with the unions. Under this agreement, Howard was obligated to contribute to the fund at a specified rate for each hour worked by the unions' members. When the collective bargaining agreement expired in May 1983, Howard and the unions were unable to agree upon a new contract. Paramount among the parties' disagreements was Howard's insistence on hiring "pre-apprentice," non-union employees to perform unit work. In December 1983, Howard presented its "final" offer to the unions, asserted that an impasse existed, and informed the unions that it intended to implement its final offer at the beginning of the new year. Howard hired its first pre-apprentice pipefitter in April 1984 and its first pre-apprentice plumber the following May.

Based upon Howard's unilateral action, the unions brought an unfair labor practice action before the National Labor Relations Board (NLRB). An ALJ concluded that, at the time Howard instituted the unilateral act of hiring pre-apprentice employees, the parties had bargained to a valid impasse;[2] thus under applicable labor law, Howard was entitled to institute unilateral changes in the work place. *Howard Elec. & Mechanical,*

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[2] Parties to labor negotiations reach an impasse at "that point at which [they] have exhausted the prospects of concluding an agreement and further discussions would be fruitless. . . . " R. Gorman, *Basic Text on Labor Law* 448 (1976). Whether an impasse exists is a matter of judgment involving, among other things, the parties' good faith, their bargaining history and the importance of the issue over which disagreement exits. *Id.*

Nos. 27 – CA – 8889, 8889-2, 8924, unpub. order at 37 (NLRB Apr. 8, 1987). However, the NLRB reversed, declining to consider whether Howard and the unions had reached impasse. *See Howard Elec. & Mechanical*, 293 NLRB No. 51, slip op. at 9-11, NLRB Dec. (CCH) ¶ 15,455 (March 29, 1989). Rather, the NLRB found that Howard's hiring of the pre-apprentice employees constituted an unfair labor practice because the unions had not agreed to exclude the pre-apprentice employees from the bargaining unit and NLRB proceedings were never instituted to change the scope of the unit. *Id.* The unions "were not required to bargain about" the scope of the bargaining unit, *id.* at 12; thus, Howard's implementation of its pre-apprentice proposal constitutioned an unfair labor practice, *id.* at 12-13. The NLRB ordered Howard to: 1) restore the status quo existing at the time the collective bargaining agreement expired and 2) resume bargaining with the unions until a new contract was agreed upon or a valid impasse reached.[3] *Id.* at 13.

Trustees' Withdrawal Liability Action

In May 1986, during the pendency of the unions' unfair labor practices action, the trustees informed Howard that it was subject to withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1462 (MPPAA). The trustees calculated Howard's withdrawal liability at $555,852 and demanded payment. Howard did not arbitrate the disputed liability,

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[3] The NLRB's decision currently is on appeal. *NLRB v. Howard, appeal docketed*, No. 89-9532 (10th Cir. May 24, 1989).

a prerequisite to maintaining a defense to withdrawal liability under § 1401 of the MPPAA. The trustees then brought the present action against Howard seeking: 1) postcontract contributions under § 1132(g)(2) of ERISA for contributions accrued after expiration of the collective bargaining agreement and 2) withdrawal liability of $255,032 under § 1381 of the MPPAA.

The trustees moved for summary judgment on the withdrawal liability claim, contending that Howard had waived all defenses to its withdrawal liability by failing to arbitrate, 29 U.S.C. § 1401(b). Howard also moved for summary judgment arguing that, according to the Supreme Court's recent holding in *Laborers Health & Welfare Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), the district court lacked jurisdiction over the trustees' action. The trustees conceded that *Advanced Lightweight Concrete* was dispositive of their § 1132(g)(2) claim for postcontract contributions, but contended that the case did not bar federal jurisdiction over the withdrawal liability claim brought under § 1381. The district court, however, dismissed the entire action for lack of jurisdiction holding that "the unfair labor practice charges brought by the unions and still pending before the NLRB are matters for which the NLRB has exclusive jurisdiction and precludes this court from proceeding in this matter." *Trustees of Colo. Pipe Indus. Pension Trust v. Howard Elec. & Mechanical, Inc.*, No. 86-M-2561, unpub. order at 4 (D. Colo. Nov. 28, 1988).

II.

This case requires us to construe the respective jurisdictional bases of two statutory remedies available to multiemployer pension plans: ERISA and the MPPAA. This Circuit has not considered whether a federal court which lacks jurisdiction over an action brought under § 1132(g)(2) of ERISA can nevertheless maintain jurisdiction over an § 1381 action brought under the MPPAA. This jurisdictional issue presents a question of law subject to *de novo* review. *Williams Natural Gas Co. v. Oklahoma City*, 890 F.2d 260 n.7 (10th Cir. 1989).

A.

Congress enacted ERISA, "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 720 (1984). Toward that end, ERISA creates a statutory obligation requiring that employers contribute to multiemployer plans in accordance with their contractual obligations.[4] 29 U.S.C. § 1145. ERISA also provides

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[4] The statute provides:

§ 1145 Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

trustees of multiemployer plans with a remedy to collect delinquent contributions, plus interest and attorney's fees, from errant employers.[5] 29 U.S.C. § 1132(g)(2).

In 1980, Congress amended ERISA to establish special rules governing multiemployer pension plans. These amendments were necessary because, under ERISA, employers could withdraw from a multiemployer pension plans without paying their share of the unfunded vested benefit liability, thereby threatening the solvency of such plans. *Advanced Lightweight Concrete*, 484 U.S. at

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[5] According to the statute:

> In any action under this title by a fiduciary for or on behalf of a plan to enforce [§ 1145] in which a judgment in favor of the plan is awarded, the court shall award the plan –
>
> (A) The unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of –
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
>
> (E) such other legal or equitable relief as the court deems appropriate. . . .

29 U.S.C. § 1132(g)(2).

545; *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1120 (D.C. Cir.), *cert. denied*, 110 S. Ct. 280 (1989); *Woodward Sand Co. v. Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691, 694 (9th Cir. 1986).

> As enacted, the [MPPAA] requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits' calculated as the difference between the present value of vested benefits and the current value of the plan's assets. 29 U.S.C. § 1381, 1391.

Gray, 467 U.S. at 725. The MPPAA empowers trustees of multiemployer plans to maintain actions for withdrawal liability and vests federal court with jurisdiction over such disputes.[6] 29 U.S.C. § 1451(a) & (c).

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[6] The statute provides in pertinent part:

§ 1451 Civil Actions

(a) Persons entitled to maintain actions. (1) A plan fiduciary . . . who is adversely affected by the act or omission of any party under this subtitle [29 U.S.C. §§ 1381 et seq.] with respect to a multiemployer plan . . . may bring an action for appropriate legal or equitable relief, or both.

. . .

(c) Jurisdiction of Federal and State Courts. The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

Under the MPPAA, an employer becomes subject to withdrawal liability once it "permanently ceases to have an obligation to contribute" to a multiemployer pension fund.[7] 29 U.S.C. § 1383(a)(1). "[T]he term 'obligation to contribute' means an obligation arising – (1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law. . . . " 29 U.S.C. § 1392(a). Under § 1392(a)(1), the employer's obligation to contribute arises from contractual agreements requiring the employer to contribute to a multiemployer fund. Once such a contact [sic] expires, the employer no longer has an obligation to contribute under § 1392(a)(1). *See Woodward Sand*, 789 F.2d at 695. An employer's obligation to contribute under § 1392(a)(2) derives from the employer's statutory duty to maintain the status quo after the expiration of a collective bargaining agreement to "promote[ ] industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations of a new contract." *Advanced Lightweight Concrete*, 484 U.S. at 544 n.6 (quotations omitted).

Pursuant to the National Labor Relations Act, 29 U.S.C. §§ 141-197 (NLRA), an employer's abrogation of terms and conditions of an expired collective bargaining agreement during negotiation of new agreement may constitute an unfair labor practice. *See, e.g., NLRB v. Katz*,

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[7] An employer may, however, suspend contributions to a multiemployer plan during a labor dispute without incurring withdrawal liability under the MPPAA. 29 U.S.C. § 1398(2). Moreover, if an employer rejoins a multiemployer plan after previously withdrawing, its liability is subject to abatement. 29 U.S.C. §§ 1387, 1388.

369 U.S. 736, 743 (1962). Thus, where an employer has an obligation to contribute to a pension plan under a collective bargaining agreement, the NLRB may obligate the employer to continue contributing to the fund after the contract has expired. *See Advanced Lightweight Concrete*, 484 U.S. at 543-44 n.5 & 6; *Woodward Sand*, 789 F.2d at 695. So long as an employer is required to contribute to a multiemployer pension plan by the NLRA, it maintains an obligation to contribute under § 1392(a)(2) of the MPPAA. Consequently, absent a procedural default, the employer cannot be assessed for withdrawal liability. An employer ceases to have an obligation to contribute under § 1392(a)(2) of the MPPAA once it bargains to impasse with its employees' unions. Once impasse is reached between the parties, an employer's NLRA-imposed duty to maintain the status quo during post-contract negotiations is extinguished, *Advanced Lightweight Concrete*, 484 U.S. at 543 n.5 (citing *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1960)), and the employer may take reasonable unilateral action without violating the NLRA, *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956, 966 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981); *Rozay's Transfer v. Local Freight Drivers, Local 208*, 850 F.2d 1321, 1332 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1768 (1989).[8]

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[8] Even upon reaching impasse, an employer's obligation to contribute is not extinguished under the MPPAA where the employer is otherwise contractually bound. *See e.g., Cuyamaca Meats v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund*, 827 F.2d 491, 497-99 (9th Cir. 1987) (where employer expressly contracted to continue contributing to pension fund through August, the fact that the

(Continued on following page)

B.

The district court held that *Advanced Lightweight Concrete* posed a jurisdictional bar both to adjudication of the trustees' action for postcontract contributions and their claim for withdrawal liability. In *Advanced Lightweight Concrete*, a pension fund sought postcontract contributions under § 1132(g)(2) of ERISA, based upon an employer's failure to maintain the status quo. 484 U.S. at 542. The Supreme Court noted that the employer's postcontract obligation to contribute was derived, not from ERISA, but from the NLRA. *Id.* at 545-46. The Supreme Court therefore held that, under § 1132(g)(2) of ERISA, original federal jurisdiction was limited to actions for contractual contributions; contributions owed solely as a result of a noncontractual statutory duty to maintain the status quo properly are sought initially in an action before the NLRB. *Id.* at 548-49. *See, e.g., Central States Pension Fund v. Behnke, Inc.*, 883 F.2d 454, 464 (6th Cir. 1989) (where pension plan trustees' § 1132(g)(2) action against employer for postcontract contributions arose from independent contractual promise in interim agreement, the district court properly exercised jurisdiction under *Advanced Lightweight Concrete*).

In the instant case, the trustees sought noncontractual contributions under § 1132(g)(2) of ERISA for the period after the expiration of the collective bargaining agreement between Howard and the unions. The only

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parties reached impasse in May did not extinguish employer's obligation to contribute triggering employer withdrawal liability before August), *cert. denied*, 485 U.S. 1008 (1988).

source of Howard's obligation to make these payments was the NLRA requirement that it maintain the status quo during the period of negotiation before impasse. Therefore, as conceded by the trustees, *Advanced Lightweight Concrete* poses a jurisdictional bar to adjudication of their § 1132(g)(2) action in district court.

The district court also held that *Advanced Lightweight Concrete* precluded federal jurisdiction over the trustees' action for MPPAA withdrawal liability. We disagree. *Advanced Lightweight Concrete* involved the "narrow category of suits seeking recovery of unpaid [noncontractual] contributions accrued during the period between contract expiration and [bargaining] impasse." *Laborers Health & Welfare Trust Fund v. Advance Lightweight Concrete Co.*, 779 F.2d 497, 505 (9th Cir. 1985), *aff'd*, 484 U.S. 539 (1988). The employer's liability in *Advanced Lightweight Concrete* for postcontract contributions was predicated upon a generalized duty imposed by the NLRA to maintain the status quo. In contrast, Howard's withdrawal liability rests upon a separate cause of action specially created by Congress, 29 U.S.C. § 1381. In *Advanced Lightweight Concrete*, by relying entirely upon ERISA to support federal jurisdiction, 484 U.S. at 543 n.4, plaintiffs essentially were attempting to hitch a remedial ERISA wagon to a NLRA horse. Here, Congress has created a distinct federal remedy – withdrawal liability – and explicitly vested federal courts with jurisdiction to adjudicate such claims. 29 U.S.C. § 1451(c). *See Central States Southeast & Southwest Areas Pension Fund v. Houston Pipe Line Co.*, 713 F. Supp. 1257, 1253 n.9 (N.D. Ill. 1989) (claim for withdrawal liability "cannot remotely be deemed an unfair labor charge" bared under *Advanced Lightweight Concrete*).

Although impasse usually is an issue determined by the NLRB in an unfair labor practices charge, district courts may "find it necessary to decide whether an impasse occurred in withdrawal liability cases in which there is a dispute over the date of withdrawal." *Advanced Lightweight Concrete*, 484 U.S. at 552 n.19. *See, e.g., Woodward Sand*, 789 F.2d at 695 (remanding MPPAA action to district court for determination of whether an impasse had been reached); *I.A.M. Nat. Pension Fund Benefit Plan C v. Schulze Tool & Die Co.*, 564 F. Supp. 1285, 1296-98 (N.D. Cal. 1983) (granting summary judgment in MPPAA action on question of impasse). Although this determination technically presents a labor law question, impasse is an issue collateral to the independent federal remedy of withdrawal liability and does not therefore defeat federal jurisdiction. *See Advanced Lightweight Concrete*, 484 U.S. at 543 n.4; *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1975) ("federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies.").

III.

Having held that the district court had jurisdiction to adjudicate the trustees' MPPAA action against Howard for withdrawal liability, we now must consider the effect of Howard's failure to arbitrate. Federal courts presented with the question of whether arbitration is required under the MPPAA uniformly have addressed the question as an issue of exhaustion of administration remedies, not as an absolute jurisdictional bar. *See Mason & Dixon Tank Lines v. Central States, Southeast & Southwest Areas*

Pension Fund, 852 F.2d 156, 163 (6th Cir. 1988); *Robbins v. Admiral Merchants Motor Freight*, 846 F.2d 1054, 1056 (7th Cir. 1988); *Central States Southeast & Southwest Areas Pension Fund v. T.I.M.E.-DC*, 826 F.2d 320, 325-28 (5th Cir. 1987); *I.A.M. Nat. Pension Fund v. Clinton Engines*, 825 F.2d 415, 417 & n.4 (D.C. Cir. 1987).

"[A]rbitration reigns supreme under the MPPAA." *Id.* at 422. The MPPAA provides: "*Any* dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under [29 U.S.C. §§ 1381-1399] *shall* be resolved through arbitration." 29 U.S.C. § 1401(a)(1) (emphasis supplied). An employer's withdrawal liability first is determined by the plan sponsor, 29 U.S.C. §§ 1382, 1399(b)(1), whereupon the employer has ninety days to request a recalculation, 29 U.S.C. § 1399(b)(2). Once the employer has responded to this request, or upon the elapse of 120 days, the employer has sixty days to request arbitration. 29 U.S.C. § 1401(a)(1). Failure to initiate arbitration within this statutory period has a harsh result – the amount demanded by the pension plan sponsor becomes due and owing.

> If no arbitration proceeding has been initiated . . . the amounts demanded by the plan sponsor under [29 U.S.C. § 1399(b)(1)] shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State of Federal court of competent jurisdiction for collection.

29 U.S.C. § 1401(b)(1). By failing to arbitrate, an employer thus waives any defenses to collection actions that could properly have been heard before the arbitrator. *See In re Centric Corp.*, No. 89-1080, slip op. at 8-9 (10th Cir. Apr.

23, 1990); *McNicholas*, 848 F.2d at 23-24; *Clinton*, 825 F.2d at 429.

In enacting the MPPAA, Congress sought to channel disputes over withdrawal liability into the informal and expeditious procedure of arbitration. *Teamsters Pension Trust Fund v. Allyn Transp. Co.*, 832 F.2d 502, 504 (9th Cir. 1987). Thus, in addition to performing the technical function of calculating an employer's withdrawal liability, MPPAA arbitrators may determine whether an employer has completely withdrawn from a plan, *id.* at 506, resolve labor issues to the extent necessary to determine whether an employer has withdrawn, *see New York Teamsters Conference Pension & Retirement Fund v. McNicholas Transp.*, 848 F.2d 20, 23 (2d Cir. 1988), and engage in statutory interpretation of the MPPAA, *Allyn*, 832 F.2d at 506; *Flying Tiger Lines v. Teamster Pension Trust Fund of Philadelphia*, 830 F.2d 1241, 1247 (3d Cir. 1987). On the other hand, arbitration may be bypassed in cases involving constitutional questions, *Marvin Hayes Lines v. Central States, Southeast & Southwest Areas Pension Fund*, 814 F.2d 297, 300 (6th Cir. 1987); *Republic Indus. v. Teamsters Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 635 (4th Cir. 1983), questions of statutory interpretation outside the MPPAA, *Flying Tiger*, 830 F.2d at 1253-55, and allegations of fraud, *Carl Colteryahn Dairy Inc. v. Western Pa. Teamsters & Employers Pension Fund*, 847 F.2d 113, 118-19 (3d Cir. 1988). Moreover, because "a failure to arbitrate does not waive a defense that the employer does not yet have," an employer who fails to arbitrate may still assert a laches defense in a subsequent collection action. *Centric*, slip op. at 10. Under the MPPAA, the arbitrator's factual findings

are presumed correct, 29 U.S.C. § 1401(b); however, district courts review the arbitrator's legal conclusions *de novo. Trustees of Amalgamated Ins. Fund v. Geltman Indus.* 784 F.2d 926, 929 (9th Cir. 1986).

Howard does not dispute the Draconian result produced by an employer's failure to arbitrate. However, Howard contends that, because its withdrawal liability hinges upon labor law questions adjudicated before the NLRB, *i.e.*, the existance [sic] of an impasse, the arbitrator lacked jurisdiction to determine whether Howard had a duty to contribute to the fund. In advancing this argument, Howard has confused jurisdiction with preclusion. Under settled principles of preclusion, relitigation of issues adjudicated before the NLRB in a subsequent MPPAA action is barred by collateral estoppel, to the extent that the issues are identical and their resolution was essential to the NLRB's determination. *See United States v. Utah Constr. Co.*, 384 U.S. 394, 422 (1966); 4 K. Davis, *Administrative Law Treatise* § 21:3 at 51-52 (1983); *Restatement (Second) Judgments* § 83. Thus, in determining whether Howard had a continuing duty to contribute to the fund under 29 U.S.C. § 1392(a), both the arbitrator and the district court on review would be obligated to accord collateral estoppel effect to the NLRB's findings. Indeed, a MPPAA arbitrator may, in his discretion, elect to stay proceedings pending resolution of a prior NLRB action. Nevertheless, this preclusionary obligation does not divest arbitrators of jurisdiction over MPPAA claims involving labor law issues nor obviate the consequences of an employer's failure to arbitrate. Even if Howard would have prevailed in arbitration, by failing to take this statutorily required procedural step, Howard waived

its defenses to withdrawal liability. *See* 29 U.S.C. § 1401(b)(2). The trustees therefore are entitled to judgment as a matter of law. *See McNicholas*, 848 F.2d at 23-24; *Robbins*, 846 F.2d at 1057; *Allyn*, 832 F.2d at 506. We recognize the severity of this result and note the criticism to which § 1401 of the MPPAA has been subjected. *See, e.g.*, Woodrum & McBride, *Controlled Group Liability Under the Multiemployer Pension Plan Amendments Act: Liability Without a Limit*, 90 W. Va. L. Rev. 731, 735 (1988) ("a federal court collection action by a plan against an employer who has failed to navigate the shoals of arbitration is tantamount to obtaining a default judgment."); Comment, *MPPAA Withdrawal Liability Assessment: Letting the Fox Guard the Henhouse*, 14 Fordham Urb. L. J. 211, 236 (1986) (criticizing MPPAA arbitration procedure). Nevertheless, Congress deemed that this harsh remedy was appropriate when it enacted the MPPAA and we decline to second-guess its judgment here.

The district court shall enter judgment for the trustees.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

ROBERT L. HOECKER May 22, 1990
CLERK

(Filed May 24, 1990)

To: ALL RECIPIENTS OF THE CAPTIONED OPINION

Re: No. 88-2938; Trustees of Colorado Pipe Industry Pension Trust v. Howard Electrical

Published opinion filed on May 18, 1990 by Honorable Bobby R. Baldock, United States Circuit Judge.

Please make the following corrections in the opinion of this court filed on May 18, 1990:

Page 4, line 2: Change "December 1984" to December 1983"

Page 7, line 15: Change "errant employees" to "errant employers"

Very truly yours,

ROBERT L. HOECKER,
CLERK

By /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-M-2561

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, et al.,

Plaintiff,

v.

HOWARD ELECTRICAL & MECHANICAL, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

In the first claim for relief in the amended complaint, filed June 25, 1987, the plaintiffs sought collection of claimed delinquent contributions to their several fringe benefit funds under the Employee Retirement Income and Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et seq. The parties entered into a stipulated pre-trial order on April 18, 1988, including fact stipulations. The defendant Howard Electrical & Mechanical, Inc., is an employer within the meaning of Section 501(1) of the Labor Management Relations Act of 1947, 29 U.S.C. § 142(1). It was signatory to collective bargaining agreements with Plumbers Local No. 3 and Pipefitters Local No. 208, which required payment to the plaintiffs as multi-employer plans within the meaning of ERISA. Those contracts expired by their terms on May 31, 1983. Efforts to negotiate new agreements failed and the employer and unions reached an impasse on December 31, 1983, at which time Howard implemented its impasse offer. Under that offer,

Howard made vacation, insurance and pension contributions to the plans for journeyman plumbers and pipefitters in its employ through December 31, 1984. On that day, the three workmen who were covered by the December 31, 1983 impasse offer left their employment with Howard and Howard then made no further payments to the plaintiffs, except for tendered contributions which plaintiffs rejected in 1987. Howard continued to perform work in the jurisdiction for which contributions were required under the terms of the expired collective bargaining agreements.

The plaintiffs concede that this first claim for relief for delinquent contributions must be dismissed because the claims do not arise out of any contractual obligation and the Supreme Court held in *Laborers Health and Welfare Trust Fund for Northern California, et al. v. Advanced Lightweight Concrete Co., Inc.*, ___ U.S. ___, 56 U.S.L.W. 4156 (Feb. 23, 1988) that the remedy provided by 29 U.S.C. § 1145 and § 1132(g)(2) is limited to the promised contributions under a collective bargaining agreement and not to any statutory obligation after the termination of that contract. The premise of the holding was that the statutory obligation, if any, arose under the employer's obligation to bargain in good faith and that any violation of § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), was a matter within the exclusive jurisdiction of the National Labor Relations Board (NLRB).

The plaintiffs' second claim for relief is for withdrawal liability under the Multi-employer Pension Plan Amendments of 1980 (MPPA), 29 U.S.C. § 1381, et seq. More particularly, the plaintiffs claim that Howard had withdrawn, effective December 31, 1984, and under 29

U.S.C. § 1381, the Plans assessed Howard the amount of $555,852.00 in withdrawal liability. Notice of withdrawal was given on May 29, 1986. Howard made no withdrawal liability payments and made no requests to arbitrate the assessment of withdrawal liability as provided for in 29 U.S.C. § 1401(a). Accordingly, the plaintiffs assert that this court has jurisdiction for the collection of the withdrawal payments under 29 U.S.C. § 1401(b). The defendants assert that there is no jurisdiction because the question of any withdrawal liability is subsumed within unfair labor practice charges which the unions brought before the NLRB and which are the subject of ongoing proceedings before that agency.

The plaintiffs contend that Howard had no obligation to make benefit contributions under its impasse offers except for those journeyman in its employ on December 31, 1983, and that obligation ended with the termination of their employment on December 31, 1984. That termination is said to be the triggering event for the determination of withdrawal liability. 29 U.S.C. § 1383 provides that a withdrawal occurs when an employer permanently ceases to have an obligation to contribute. Thus, it is argued that the termination of the employment of these journeyman and the stopping of contributions on their behalf ended this employer's obligation to participate in the plans. Plaintiffs contend that the failure of Howard to seek arbitration of the dispute precludes any defense in this court and therefore summary judgment is appropriate on the second claim for relief.

This case presents the difficulty of construing two statutory schemes regulatory employment. ERISA, as

amended by MPPA, reflects an extensive effort by Congress to protect the integrity and financial stability of private pension and welfare plans in the national public interest. MPPA was enacted for the particular protection of multi-employer plans and the withdrawal liability is a statutory obligation to protect the remaining contributors after an employer withdraws. Such liability was not before the Supreme Court in the *Advanced Lightweight Concrete* case. But, as the Court noted, the obligation to contribute under the plan includes both the employer's contractual obligation and any obligation imposed by the NLRA. Here, the imposition of withdrawal liability by the plaintiffs was directly related to the negotiating history of the dispute between the unions and the employer. The unfair labor practice charges brought by the unions directly relate to, and indeed control, the question of whether there was a permanent underlying termination of an obligation to contribute under the plans within the meaning of 29 U.S.C. § 1383. It is this court's conclusion that the enactment of the requirement for arbitration in Section 1401(a) was not intended to supersede or supplant the authority of the NLRB under the NLRA and that the unfair labor practice charges brought by the unions and still pending before the NLRB are matters for which the NLRB had exclusive jurisdiction and preclude this court from proceeding in this matter. Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted and this civil action is dismissed for lack of jurisdiction.

Dated: *November 28, 1988*

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch, Judge

UNITED STATES DISTRICT COURT

___ DISTRICT OF COLORADO

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, et al.,

Plaintiffs,

v.

HOWARD ELECTRICAL & MECHANICAL, INC.,

Defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER 86-M-2561

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered. Pursuant to memorandum opinion and order entered by Judge Richard P. Matsch on November 28, 1988,

IT IS ORDERED AND ADJUDGED

that the defendants' motion for summary judgment is granted and this civil action is dismissed for lack of jurisdiction.

November 28, 1988
Date

JAMES R. MANSPEAKER
Clerk

/s/ Jacob Gilmore
(By) Deputy Clerk

Case Number: 86-M-2561

I certify that I mailed a copy of the attached to the following:

Dated: 11-28-88

JAMES R. MANSPEAKER, CLERK

By: /s/ Jacob Gilmore
Jacob Gilmore, Deputy Clerk
Terri A. Smethers, Secretary

James C. Fattor
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Earl K. Madsen
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293 NLRB No. 51

SJC
D – 9476
Denver, CO

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOWARD ELECTRICAL AND MECHANICAL, INC.	Cases 27 – CA – 8889 27 – CA – 8889 – 2
and	
PLUMBERS LOCAL UNION NO. 3, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA	Case 27 – CA – 8924
PIPEFITTERS LOCAL UNION NO. 208, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA	

DECISION AND ORDER
(Filed April 3, 1989)

On April 8, 1987, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The General Counsel filed exceptions and a supporting brief. The

Respondents filed exceptions, a supporting brief, and an answering brief to the General Counsel's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

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[1] The Respondent filed a motion for leave to supplement the record evidence, requesting that two letters from the Charging Parties to the Respondent dated November 12 and 13, 1986, be added to the record. The Charging Parties opposed the motion because the documents in question were already a part of the record as Jt. Exhs. 37(a) and (b). On examination of the record, we find the Charging Parties' observation to be correct and deny the Respondent's motion.

[2] The Respondent excepts to the judge's findings that the Regional Director properly set aside the informal Board settlement agreements resolving these cases. After careful review of the judge's decision, we adopt these findings because we agree that there was no meeting of the minds by the parties insofar as the settlements affected the Respondent's right to employ plumbers and pipefitters as "pre-apprentices." In this regard, we observe that the judge found that when the Respondent read the language of the settlements it could have reasonably believed the parties meant the Respondent was obligated to apply the December 1983 proposals to those individuals claimed as pre-apprentices. No exception to this finding was filed.

Member Cracraft agrees that the Regional Director was warranted in setting aside the October 17, 1984 settlement agreements, but for reasons other than those stated by the judge and adopted by her colleagues. She would find instead

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The second amended complaint is based on charges filed by Plumbers Local Union No. 3 (the Plumbers) on

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that the Respondent breached the settlement agreements when it classified new hires as pre-apprentices and unilaterally established their rates of pay and ceased to contribute to employee benefit funds established in the 1981-1983 contract on their behalf. The settlement agreements stated that all employees would be reimbursed for differences in wage rates. The agreement with Local 3 cited Al Farrell as an employee who, along with other similarly situated employees, should be made whole. Farrell was hired on June 27, 1984, as a pre-apprentice and paid $12 per hour with no contribution to employee benefit funds. Unless the settlement required the parties to return to the 1981 – 1983 contract conditions rather than, as the Respondent contends, to the conditions set forth in the Respondent's December 1983 proposals, the requirement of backpay for Farrell and those similarly situated is meaningless. Thus, Member Cracraft would find that the settlement agreements prohibited the Respondent from classifying new hires as pre-apprentices, unilaterally establishing their rates of pay, and failing to contribute to employee benefit funds on their behalf, when it took such actions. For that reason, Member Cracraft would set aside the settlement agreements. Although, as noted by her colleagues, no specific exception was taken to the judge's finding that the Respondent could have reasonably believed the language of the settlement agreements meant that it was obligated to apply the December 1983 proposals to pre-apprentices, Member Cracraft notes that the Respondent specifically excepted to the judge's findings that the settlement agreements should be set aside and that there was no meeting of the minds regarding the settlement agreements at the time of their execution. In her view, these exceptions squarely place the issue of the parties' intent when the settlement agreements were entered into before the Board.

The complaint alleges that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing the unit employees'

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July 23 and August 28, 1984, and a charge filed by Pipefitters Local Union No. 208 (the Pipefitters) on August 22, 1984, later amended on August 25, 1984. According to the allegations in the second amended complaint, during the bargaining sessions with the Unions held in late December 1983, the Respondent insisted on proposals that were a nonmandatory subject of bargaining because they constituted an attempt to alter the scope of the existing contractual units by excluding plumbers and pipefitters classified as pre-apprentices. The second amended complaint alleges further that, inter alia, the Respondent violated Section 8(a)(5) and (1) of the Act when it implemented its December contract proposals on or after January 23, 1984, in the Plumbers unit and on or after

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benefits when it implemented its August 15, 1984 proposal without affording the Unions an opportunity to bargain about the matter. The judge dismissed this allegation because there was insufficient evidence to establish that the Respondent, in fact, had implemented its August proposal. The General Counsel excepts to this dismissal. In agreeing with the judge, we note that the General Counsel does not dispute that the evidence did not show actual implementation, but, rather, she incorrectly relies on the Respondent's announced intent to implement the proposal as establishing the unilateral implementation. See *Swift Independent Corp.*, 289 NLRB No. 51, fn. 11 (June 29, 1988) (limitations period commenced at closing of plant rather than at time of the announcement of the closing). Cf. *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983) (announcement of new working conditions to *employees* constitutes implementation of policy).

The judge dismissed the 8(a)(5) complaint allegation pertaining to the Respondent's bargaining conduct in July 1985. In the absence of exceptions, we adopt this dismissal.

February 22, 1984, in the Pipefitters unit in the absence of a valid, good-faith bargaining impasse. According to the General Counsel, because the Unions never agreed to exclude the pre-apprentices and Board proceedings were never initiated to change the contractual units, the Respondent could not treat the pre-apprentices as non-unit employees, assign them unit work, and fail to apply unit wages and employment terms to employees in the unilaterally established pre-apprentice classification. The second amended complaint further alleges that the Respondent violated Section 8(a)(5) and (1) of the Act when it implemented its June 1984 contract proposals in both units on July 1, 1984. With respect to this allegation, the General Counsel contends, inter alia, that the Unions were not afforded an opportunity to bargain over the June proposals before their implementation.

The judge dismissed the allegations pertaining to the December proposals on the ground that, under *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960),[3]

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[3] In *Bryan*, supra, the parties executed a collective-bargaining agreement in August 1954. The agreement contained a recognition provision and a union-security provision. At the time of execution, the union did not represent a majority of the employer's employees. In June and August 1955, 10 and 12 months later, charges were filed alleging that the maintenance and enforcement of the agreement violated the Act. The Court concluded that Sec. 10(b) barred the allegations. More precisely, the Court held that these charges were untimely because the conduct occurring within the limitations period could be an unfair labor practice only through reliance on an earlier unfair labor practice that was itself time-barred because it was based entirely on events occurring outside the 10(b) period.

these allegations were barred by the limitations period in Section 10(b) of the Act.[4] He concluded that they were based on pre-10(b) conduct that would constitute an unfair labor practice. The judge also dismissed the allegations pertaining to the June proposals because he found that, prior to implementation, the Unions had merely rejected these proposals in their entirety and had not specifically opposed the Respondent's interjection of the alleged nonmandatory issues. Given this context, the judge found that the June proposals were implemented after the Respondent had bargained with the Unions to a valid impasse. For the reasons set forth below, we reverse the judge and find, based on the stipulated record, that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing its December and June proposals.

The Respondent is engaged in the building and construction industry as an electrical and mechanical contractor in the Denver, Colorado area. In separate bargaining units, the Plumbers and the Pipefitters represent the journeymen and apprentice plumbers, gas fitters, pipefitters, and various foremen employed by the Respondent.[5] The Unions' most

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[4] Sec. 10(b) of the Act provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

[5] The parties stipulated that, at all times material, the Unions have been and are the exclusive representatives of their respective units under Sec. 9(a) of the Act. Although this stipulation was entered into prior to the issuance of our decision in *John Deklewa & Sons*, 282 NLRB No. 184 (Feb. 20, 1987), and therefore may simply have reflected the Respondent's concession that it would be deemed to have a 9(a) relationship

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recent collective-bargaining agreements with the Respondent expired on May 31, 1983.

The Respondent and the Unions began separate, but parallel, negotiations for successor agreements in 1983. Prior to December 1983, the Respondent met with the Plumbers on March 23, April 27, May 19 and 31, and July 6 and with the Pipefitters on March 22, April 15 and 27, May 19, June 1 and 28, July 20, September 16, and November 17.

As reflected by the minutes for the pre-December bargaining sessions, the Respondent offered the Unions several proposals on different subjects, including proposals changing the contractual recognition clauses. Both contractual recognition clauses included the following classifications: journeyman plumbers and gas fitters, apprentice plumbers and gas fitters, area plumber foremen, general plumber foremen, plumber foremen, journeymen pipefitters, apprentice pipefitters, area pipefitter foremen, general pipefitter foremen, and pipefitter foremen. The Pipefitters contractual recognition clause also included the classification of "provisional apprentices."

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under the issuance of *Deklewa*, we nonetheless reject the Respondent's attempt to rely on *Deklewa* here because it is untimely. This claim was not raised to the judge, whose decision was issued more than a month after the decision in *Deklewa*, nor was it raised in the Respondent's exceptions to the Board filed on May 26, 1987. For the purposes of this case, the Respondent and the Unions have a 9(a) bargaining relationship. Member Johansen agrees that the reason for the stipulation is irrelevant and that the attempt to raise the nature of the bargaining relationship is untimely.

At the pre-December bargaining sessions with the Plumbers, the Respondent proposed that the Plumbers unit be described in the successor contract as

> all full time and regular part-time employees employed by the Employer performing plumbing work in the plumbing industry within the jurisdiction of Local 3 as it exists at the time of the execution of this agreement.

At the pre-December bargaining sessions held with the Pipefitters, the Respondent similarly proposed that the Pipefitters unit be described in the successor contract as

> all full time and regular part-time employees employed by the Employer performing pipe fitting work in the pipe fitting industry within the jurisdiction of Local Union 208 as it exists at the time of execution of this agreement.

These minutes reveal in general terms that the Respondent's recognition clause proposals were reviewed and discussed with both Unions during the pre-December bargaining sessions. At the July 6 bargaining session, the Plumbers, through a letter from its attorney, objected to the Respondent's proposed unit modification. The Plumbers' objection was that temporary part-time employees and any additional future jurisdictional territory of the Union were excluded by the Respondent's proposal. With respect to the Pipefitters negotiations, the record does not disclose what the discussions were concerning the Respondent's proposed unit modification.

At the bargaining sessions held on December 29, 1983, with the Plumbers and on December 30, 1983, with the Pipefitters, the Respondent submitted several new

proposals. The Respondent proposed, inter alia, that certain plumbers and pipefitters be classified as pre-apprentices and be excluded from both units.[6] The Respondent's proposals defined "pre-apprentices" as employees who "shall be primarily used for performing work which does not require all the skills of a journeyman" and "may be assigned to perform work for which they are qualified, under the direction of a journeyman." The Respondent also proposed the exclusion of pre-apprentices from the coverage of the union-security and hiring hall provisions of the contracts; a minimum hourly wage rate for pre-apprentices lower than what it proposed for unit employees; and no contract fringe benefits, except profit-sharing participation and major medical insurance plan coverage, for pre-apprentices.

The Respondent characterized its December proposals as a "final" or "last" offer. At the December 29

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[6] In this connection, the Respondent proposed that it recognize the Plumbers as the sole and exclusive bargaining representative for and on behalf of all full time and regular part-time employees and temporary part-time employees except pre-apprentices and supervisors employed by the Employer performing plumbing work in the plumbing industry within the jurisdiction of Local Union 3 as it exists at the time of execution of this agreement.

The Respondent proposed that it recognize the Pipefitters as the sole and exclusive bargaining representative for and on behalf of all full time, regular part-time employees and temporary part-time employees except pre-apprentices and supervisors employed by the Employer performing pipe fitting work in the pipe fitting industry.

bargaining session with the Plumbers, the Respondent said that it "intended to implement its final offer effective January 1, 1984." At the December 30 session, the Pipefitters said that the Respondent's offer would be submitted to the Union's membership. The record does not otherwise disclose what transpired at these bargaining sessions.[7] Shortly thereafter, the Respondent's December proposals for both Unions were rejected.

The Respondent and the Pipefitters continued their negotiations in January 1984. On January 11, 1984, the Pipefitters requested further negotiations. On January 16, 1984, the Respondent agreed to meet if the Pipefitters submitted a written proposal "substantially better" than the last proposal on the table. On January 20, 1984, the Pipefitters submitted a written contract proposal, which did not include the Respondent's December pre-apprentice proposals. In its letter of January 26, 1984, the Respondent rejected the Pipefitter's counteroffer, claiming that it did not contain a single concession and included numerous changes. The Respondent stated that in these circumstances there was no reason to resume negotiations with the Pipefitters. The Respondent also asserted that impasse existed and it would implement its last offer. The Respondent did not specify when implementation would occur.

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[7] The record does not demonstrate whether, or to what extent any of the Respondent's December proposals were discussed or considered by the Respondent and the Unions at those meetings. Minutes for the December 29 and 30 bargaining sessions were not made a part of the stipulated record.

Without using the Unions' hiring halls, the Respondent hired its first pre-apprentice plumber on May 17, 1984, and its first pre-apprentice pipefitter on April 30, 1984. During their employment, both pre-apprentices were assigned unit work, but were treated as nonunit employees and did not receive unit wages or all the unit fringe benefits.[8]

The next communication with either Union was the Respondent's contract proposals of June 19, 1984. The Respondent's June proposals differed from its December 1983 proposals in that, inter alia, the June proposals excluded apprentices from the bargaining unit and the hiring hall contractual requirement, omitted the union-security clause for all unit employees, and eliminated the Respondent's obligation to contribute to the apprentice and journeymen training fund for all unit employees.[9] The Respondent informed the Unions that its June proposals "must be accepted in total, prior to July 1, 1984."

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[8] Thereafter, the Respondent hired other plumbers and pipefitters who were classified as pre-apprentices and were similarly treated as nonunit employees.

[9] In particular, the June proposals included a clause recognizing each Union as "the sole and exclusive bargaining representative for and on behalf of all full time, regular part-time employees and temporary part-time employees except apprentices, pre-apprentices and supervisors, employed by the Employer" and "performing plumbing work at the jobsite in the plumbing industry" for the Plumbers unit and "performing pipe fitting work at the jobsite in the pipe fitting industry" for the Pipefitters unit.

On June 27, 1984, the Plumbers notified the Respondent that it had rejected the June proposals, but offered to meet in the future to discuss a contract. The Plumbers' request was not honored and negotiations on the June proposals were not held. On July 3, 1984, the Pipefitters notified the Respondent that it had rejected the June proposals and indicated that it was willing to continue negotiations. After receiving the Unions' notices, the Respondent thereafter implemented the June proposals for both units.

With regard to the implementation of the Respondent's December and June proposals, the judge determined that the limitations period for the unilateral changes occurring on April 30 and May 17, 1984, was triggered not by their implementation dates, but by the Respondent's earlier announced intent to implement its December proposals and by a purported "unprivileged and invalid" impasse reached on December 29 and 30, 1983. The judge additionally based his conclusion that the complaint was time-barred on his interpretation of the complaint allegations as requiring a finding that the impasse that occurred in December, outside the 10(b) period, was unlawful. The judge thus concluded that the finding of a violation would run afoul of the dictates of *Bryan*, supra. We find that the judge's analysis rests on at least two erroneous premises.

First, the judge erroneously assumed that a determination of whether a valid impasse occurred is essential to a determination of whether implementation of the Respondent's December proposals violated the Act. As we explain below, however, when a party unilaterally changes the scope of the unit, it is irrelevant whether

impasse has been reached. The only question is whether the other party has consented to the change. Thus, we need not scrutinize the December events for evidence of impasse to determine that the Respondent violated the Act when it unilaterally implemented the proposals in April and May.

Second, the judge erroneously dated the actual implementation from the Respondent's announcement of an intent to implement. Notice of an intent to commit an unlawful unilateral implementation, however, does not trigger the 10(b) period with respect to the unlawful act itself. *American Distributing Co. v. NLRB*, 715 F.2d 446, 452 (9th Cir. 1983), enfg. 264 NLRB 1413 (1982).[10] The judge acknowledged that the first indication that the Respondent was implementing terms of its December proposals came when the Respondent began the hiring of preapprentices in April and May. In fact, had other terms

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[10] Thus, even if the existence of a prior valid impasse were relevant to a determination of the unilateral implementation violation involved here, the 10(b) period for the implementation allegation would start running at the time the unilateral changes were implemented rather than from the date of the alleged impasse.

Of course, it is arguable that the Respondent violated Sec. 8(a)(5) in January 1984 when it refused to engage in further bargaining with the Pipefitters unless the latter consented to changes in unit scope. But that violation (conditioning further bargaining on concessions as to nonmandatory subjects) would be entirely independent of the later implementation, which, as we find below, was unlawful because it was done without the Unions' consent. Notice of one type of violation would not start the 10(b) period running as to the other.

which the Respondent proposed in December been implemented, such as the manner in which benefit contributions were made, the Unions might have been on notice that the implementation had occurred. Accordingly, we find that the actionable, alleged unfair labor practice occurred here when the pre-apprentice proposals were implemented in April and May and that the 10(b) period did not start running until that time.[11]

Accordingly, we turn our attention to the merits of the case.[12] With its pre-apprentice proposals, the Respondent was, in effect, attempting to gain the Unions' permission to create a new classification of workers who

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[11] See *American Distributing Co.*, supra; *Swift Independent Corp.*, supra, 289 NLRB No. 51 at fn. 11; and *Teamsters Local 42 (Daly Co.) v. NLRB*, 825 F.2d 608, 615 (1st Cir. 1987). The Respondent relies, inter alia, on *Postal Service Marina Center*, 271 NLRB 397 (1984). We note, however, that in that case, which involved a discriminatory discharge, the Board expressly stated that it was not considering what implication, if any, the holding there would have in other contexts. Id. at 401.

[12] The General Counsel, by raising the question of whether a valid impasse existed here, seemingly implies that the Respondent would have escaped liability by the existence of a valid impasse. Although the record does not demonstrate either that the parties were deadlocked on the pre-apprentice proposals, which modified the existing units, or that the Respondent had insisted on these proposals (a subject the Unions were not required to bargain about) as a precondition to reaching successor contracts, a focus on impasse is misplaced here. Given the character of the pre-apprentice proposals, the Respondent would not escape liability by the existence of an impasse. Rather, as found infra, the Respondent violated the Act because it implemented its unit scope proposals without the consent of the Unions.

would perform traditional bargaining unit work, but would be specifically excluded from the unit. While the record does not indicate the substance or length of the parties' December discussions concerning the pre-apprentice concept, it is undisputed that the Unions did not agree to this concept.

The Plumbers, aside from rejecting the pre-apprentice proposals as part of a final offer package after the December sessions, took the position that, starting with the July 6, 1983 session, it wanted to continue to represent all employees performing plumbing work for the Respondent. Similarly, the Pipefitters' counteroffer of January 1984 does not indicate that it is final and also suggests that the Pipefitters did not want the pre-apprentice proposals. The Pipefitters' counteroffer, submitted at a time when the Respondent was looking for a "substantially better" offer from that Union, did not include the Respondent's pre-apprentice proposals. As noted above, the crucial question in the case is whether the Unions consented to the proposed changes in the scope of the unit, changes over which, because of their nonmandatory nature, the Unions were not even required to bargain. In these circumstances, we find that the Respondent unlawfully implemented its December pre-apprentice proposals because they concerned subjects which the Unions were not required to bargain about and the implementation was done without the consent of the Unions.[13]

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[13] See, e.g., *Boise Cascade Corp.*, 283 NLRB No. 69 (Mar. 31, 1987), enfd. 860 F.2d 471 (D.C. Cir. 1988).

We also reverse the judge's findings with respect to the complaint allegations relating to the implementation of the Respondent's June package proposals. On receipt of the June proposals, which differed from the Respondent's December package proposals, the Unions notified the Respondent that they were willing to continue negotiations. The Respondent ignored the Unions' requests and declared an impasse prior to any further negotiations. This demonstrates that the Respondent had a fixed determination to implement its June package proposals regardless of the status of its negotiations with the Unions and without the Unions' consent. Accordingly, we find that the implementation of the Respondent's June package proposals violated Section 8(a)(5) and (1). See *Excavation-Construction, Inc.*, 248 NLRB 649 (1980).

Conclusions of Law

1. By refusing to bargain in good faith with Plumbers Local Union No. 3 and Pipefitters Local Union No. 208 as the exclusive bargaining representatives of the employees in the contractual bargaining units when it unilaterally implemented its December 1983 and June 1984 contract proposals, thereby changing the wages, benefits, and other terms and conditions of employment for bargaining unit employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

2. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in and is engaging in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall order that, on request, the Respondent bargain with the Unions and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also order that, on request, the Respondent restore the status quo and rescind the unilateral changes made in the respective units commencing April 30 and May 17, 1984, and make all affected employees whole for losses they incurred by virtue of its unilateral changes from April 30 and May 17, 1984, until it negotiates in good faith with the Unions to agreement or to a valid impasse. If the unions elect to have previous conditions restored, calculations of the sums and payments necessary to make employees whole, with interest, shall be computed in accordance with normal Board policy. See *Ogle Protection Service*, 183 NLRB 682 (1970); *New Horizons for the Retarded*,[14] 283 NLRB No. 181 (May 28, 1987); *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

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[14] Interest on or after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

ORDER

The National Labor Relations Board orders that the Respondent, Howard Electrical and Mechanical, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Plumbers Local Union No. 3 and Pipefitters Local Union No. 208 as the exclusive bargaining representatives of the employees in the bargaining units described below as Unit A and Unit B by unilaterally implementing its December 1983 and June 1984 contract proposals that changed the wages, benefits, and other terms and conditions of employment for bargaining unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Plumbers Local Union No. 3 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Unit A

All journeymen plumbers and gas fitters, apprentice plumbers and area fitters, area plumber foremen, general plumber foremen, plumber

foremen, journeymen pipefitters, apprentice pipefitters, area pipefitter foremen, general pipefitter foremen, and pipefitter foremen who are employed by the Respondent, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

(b) On request, bargain with Pipefitters Local Union No. 208 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Unit B

All journeymen plumbers and gas fitters, apprentice plumbers and gas fitters, area plumber foremen, general plumber foremen, plumber foremen, journeymen pipefitters, apprentice pipefitters, area pipefitter foremen, general pipefitter foremen, pipefitter foremen, and provisional apprentices employed by the Respondent, excluding all other employees, office clerical employees, guards and supervisors as defined by the Act.

(c) On request of the Unions, rescind the unilateral changes in the unit employees' wages, benefits, and other terms and conditions of employment that were made commencing April 30, 1984, in Unit B and May 17, 1984, in Unit A and make all those employees whole, with interest, for losses they incurred by virtue of its unilateral changes to their wages, benefits, and other terms and conditions of employment from April 30 and May 17, 1984, respectively, until it negotiates in good faith with

the Unions to agreement or to a valid impasse in the manner set forth in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Denver, Colorado office copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. March 29, 1989

James M. Stephens,
Chairman

Wilford W. Johansen,
Member

Mary Miller Cracraft,
Member

NATIONAL LABOR RELATIONS
BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Plumbers Local Union No. 3 and Pipefitters Local Union No. 208 as the exclusive bargaining representatives of the employees in the bargaining units described below as Unit A and Unit B, respectively, by unilaterally implementing our December 1983 and June 1984 contract proposals, that changed the wages, benefits, and other terms

and conditions of employment for bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with Plumbers Local Union No. 3 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Unit A

All journeymen plumbers and gas fitters, apprentice plumbers and gas fitters, area plumber foremen, general plumber foremen, plumber foremen, journeymen pipefitters, apprentice pipefitters, area pipefitter foremen, general pipefitter foremen, and pipefitter foremen who are employed by the Employer, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL, on request, bargain with Pipefitters Local Union No. 208 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Unit B

All journeymen plumbers and gas fitters, apprentice plumbers and gas fitters, area plumber foremen, general plumber foremen, plumber foremen, journeymen pipefitters, apprentice pipefitters, area pipefitter foremen, general

pipefitter foremen, pipefitter foremen, and provisional apprentices employed by the Employer, excluding all other employees, office clerical employees, guards and supervisors as defined by the Act.

WE WILL, on request of the Unions, rescind the unilateral changes in the unit employees' wages, benefits, and other terms and conditions of employment that were made on or after April 30, 1984, in Unit B and May 17, 1984, in Unit A and WE WILL make all those employees whole, with interest, for losses they incurred by virtue of our unilateral changes to their wages, benefits, and other terms and conditions of employment from April 30 and May 17, 1984, respectively, until we negotiate in good faith with the Unions to agreement or to a valid impasse.

HOWARD ELECTRICAL
AND MECHANICAL, INC.

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 600 17th Street, Third Floor, South Tower, Denver, Colorado 80202-5433, Telephone 303-844-3554.

JD(SF)–39–87
Denver, Colo.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

HOWARD ELECTRICAL AND MECHANICAL, INC.

and

Cases
27–CA–8889
27–CA–8889-2
27–CA–8924

PLUMBERS LOCAL UNION NO. 3, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

and

PIPEFITTERS LOCAL UNION NO. 208, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

Barbara E. Young, for the General Counsel. *Hornbein, MacDonald & Fattor* by *James C. Fattor*, for the Charging Parties.
Kapland, Jacobowitz, Byrnes, Rosier & Hendricks, by *James P. Hendricks*, for the Respondent.

DECISION

Statement of the Case

JERROLD H. SHAPIRO, Administrative Law Judge: This proceeding, in which a hearing was held January 21, 1987, is based upon the following: Charges filed in Cases 27–CA–8889 and 27–CA–8889-2 by Plumbers Local Union No. 3 against Howard Electrical and Mechanical, Inc. (Respondent) on July 23, 1984 and August 28, 1984 respectively; A charge filed in Case 27-CA-8924 and an amended charge filed in that case by Pipefitters Local Union No. 208 against Respondent on August 22, 1984 and August 25, 1984 respectively; A second amended complaint issued in these cases November 26, 1986 on behalf of the General Counsel of the National Labor Relations Board (Board), by the Board's Regional Director, Region 27, alleging Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (Act); The Regional Director's November 26, 1986 Order setting aside and vacating the settlement agreements entered into in these cases by the parties which had been approved on October 17, 1984 by the Regional Director; and, Respondent's answer to the second amended complaint denying the commission of the alleged unfair labor practices.[1]

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[1] In its answer Respondent admits it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and meets the Board's applicable discretionary jurisdictional standard. Also in its answer Respondent admits that the Charging Parties, Plumbers Local Union No. 3 and Pipefitters Local Union No. 208, each are labor organizations within the meaning of Section 2(5) of the Act.

Upon the entire record[2] and having considered the parties' posthearing briefs,[3] I make the following:

Findings of Fact

I. The Alleged Unfair Labor Practices

A. *The Facts*

1. The setting

Respondent, a corporation with its principal office and place of business in Denver, Colorado, is an electrical and mechanical contractor in the building and construction industry. The Charging Parties, Plumbers Local Union No. 3, (Local 3) and Pipefitters Local Union No. 208 (Local 208), who are affiliated with the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, represent separate appropriate bargaining units of Respondent's employees. Local 3 at all times material has been and is the exclusive collective bargaining representative of the following appropriate unit of Respondent's employees:

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[2] The record consists of the formal papers, the parties' stipulation of facts as amended at the hearing, the parties' supplemental joint stipulation of facts, the parties' oral arguments, and their post hearing briefs.

[3] Respondent's Motion to Strike certain parts of the briefs filed by the General Counsel and the Charging Parties on the ground that they raise legal issues "outside the scope of the issues they indicated were in question during the on-the-record colloquy with the Administrative Law Judge," is denied. I have considered all of the arguments raised by the parties which are encompassed by the allegations of the second amended complaint.

> All journeymen, plumbers and gas fitters, apprentice plumbers and gas fitters, area plumber foremen, general plumber foremen, plumber foremen, journeymen pipefitters, apprentice pipefitters, area pipefitter foremen, general pipefitter foremen, and pipe fitting foremen who are employed by the Employer, excluding all other employees, office clerical employees, guards and supervisors as defined by the Act.

Local 208 at all times material has been and is the exclusive collective bargaining representative of the following appropriate unit of Respondent's employees:

> All journeymen plumbers and gas fitters, apprentice plumbers and gas fitters, area plumber foremen, general plumber foremen, plumber foremen, journeymen pipefitters, apprentice pipefitters, area pipefitter foremen, general pipefitter foremen, pipefitter foremen, and provisional apprentices employed by the Employer, excluding all other employees, office clerical employees, guards and supervisors as defined by the Act.

The Charging Parties and Respondent have been parties to a series of successive collective bargaining contracts. The most recent was effective May 1, 1981 through May 31, 1983, herein called the 1981-1983 contract. This contract is between the Charging Parties and the Contract Administration Fund of Northeastern Colorado, herein called the Association, on behalf of those employees including Respondent for whom the Association was authorized to bargain. The recognition clause in the 1981-1983 contract reads as follows:

> The Employers recognize the Unions as the sole and exclusive bargaining representatives, as certified by the National Labor Relations Board, Cases No. 30-RC-701 dated July 30, 1952 and

(III) This clause shall not apply in the case of any withdrawal described in subparagraph (D).

(IV) If under a plan this clause applies to any plan year but does not apply to the next plan year, this clause shall not apply to any plan year after such next plan year.

(V) For purposes of this clause, the term "required contributions" means, for any period, the amounts which the employer was obligated to contribute for such period (not taking into account any delinquent contribution for any other period).

(iii) A plan may be amended to provide that for the first plan year ending on or after September 26, 1980, the number "5" shall be substituted for the number "10" each place it appears in clause (i) or clause (ii) (whichever is appropriate). If the plan is so amended, the number "5" shall be increased by one for each succeeding plan year until the number "10" is reached.

(D) In any case in which a multiemployer plan terminates by the withdrawal of every employer from the plan, or in which substantially all the employers withdraw from a plan pursuant to an agreement or arrangement to withdraw from the plan –

(i) the liability of each such employer who has withdrawn shall be determined (or redetermined) under this paragraph without regard to subparagraph (B), and

(ii) notwithstanding any other provision of this part, the total unfunded

vested benefits of the plan shall be fully allocated among all such employers in a manner not inconsistent with regulations which shall be prescribed by the corporation.

Withdrawal by an employer from a plan, during a period of 3 consecutive plan years within which substantially all the employers who have an obligation to contribute under the plan withdraw, shall be presumed to be a withdrawal pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

(E) In the case of a partial withdrawal described in section 4205(a) [29 USCS § 1385(a)], the amount of each annual payment shall be the product of –

(i) the amount determined under subparagraph (C) (determined without regard to this subparagraph), multiplied by

(ii) the fraction determined under section 4206(a)(2) [29 USCS § 1386(a)(2)].

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.

(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. If the prepayment is made pursuant to a withdrawal which is later determined to be part of a withdrawal described in paragraph (1)(D), the withdrawal liability of the employer shall not be limited to the amount of the prepayment.

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means –

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

(6) Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by the corporation.

(7) A multiemployer plan may adopt rules for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules –

(A) are consistent with this Act, and

(B) are not inconsistent with regulations of the corporation.

(8) In the case of a terminated multiemployer plan, an employer's obligation to make payments under this section ceases at the end of the plan year in which the assets of the plan (exclusive of withdrawal liability claims) are sufficient to meet all obligations of the plan, as determined by the corporation.

(d) Applicability of statutory prohibition. The prohibitions provided in section 406(a) [29 USCS § 1106(a)] do not apply to any action required or permitted under this part.

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§ 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc. (1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 4201 through 4219 [29 USCS §§ 1381-1399] shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of –

(A) the date of notification to the employer under section 4219(b)(2)(B) [29 USCS § 1399(b)(2)(B)], or

(B) 120 days after the date of the employer's request under section 4219(b)(2)(A) [29 USCS § 1399(b)(2)(A)].

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 4219(b)(1) [29 USCS § 1399(b)(1)].

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 4201 through 4219 and section 4225 [29 USCS §§ 1381-1399 and 1405] is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that –

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings. (1) If no arbitration proceeding has been initiated pursuant to subsection (a), the amounts demanded by the plan sponsor under section 4219(b)(1) [29 USCS § 1399(b)(1)] shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 4301 [29 USCS § 1451] to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this title, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena [sic] power), and enforced in United States courts as an arbitration proceeding carried out under title 9, United States Code [9 USCS §§ 1 et seq.].

(c) Presumption respecting finding of fact by arbitrator. In any proceeding under subsection (b), there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments. Payments shall be made by

an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 515 [29 USCS § 1145]).

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees. If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

§ 1451. Civil actions

(a) Persons entitled to maintain actions. (1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle [29 USCS §§ 1381 et seq.] with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time. In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 515 [29 USCS § 1145]).

(c) Jurisdiction of Federal and State courts. The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process. An action under this section may be brought in the district where the plan is

administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses. In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

(f) Time limitations. An action under this section may not be brought after the later of –

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation. A copy of the complaint in any action under this section or section 4221 [29 USCS § 1401] shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

(2)

No. 90-844

In The

Supreme Court of the United States

October Term, 1990

HOWARD ELECTRICAL & MECHANICAL, INC., and HOWARD SYSTEMS, INC.,

Petitioners,

v.

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do the provisions of the Multi-Employer Pension Plan amendments action of 1980 (MPPAA), 29 U.S.C. § 1381, et seq. apply to an action brought for withdrawal liability, even if, in such action, there are collateral issues that would under most circumstances be resolved by the National Labor Relations Board.

TABLE OF CONTENTS

Page

JURISDICTION 1

STATEMENT 1

A. PREFATORY REMARKS 1

B. NATURE OF THE CASE AND SUMMARY OF RELEVANT FACTS 1

C. SUMMARY OF PROCEEDINGS BELOW 3

SUMMARY OF ARGUMENT 4

A. THE DECISION OF THE CIRCUIT COURT BELOW IS CONSISTENT WITH THIS COURT'S OPINION IN LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, ET AL. V. ADVANCED LIGHTWEIGHT CONCRETE CO., INC., SUPRA, THE STATUTORY SCHEME FOR THE DETERMINATION AND ENFORCEMENT OF WITHDRAWAL LIABILITY AND ALL OF THE CIRCUITS WHICH HAVE RESOLVED THE ISSUE THAT THE COURT BELOW HAD BEFORE IT 4

ARGUMENT 4

A. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S DECISION IN LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, ET AL. V. ADVANCED LIGHTWEIGHT CONCRETE CO., INC. 4

B. THE DECISION BELOW WAS CONSISTENT WITH THE STATUTORY SCHEME 6

TABLE OF CONTENTS – Continued

Page

C. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Central States Pension Fund v. Time D.C., 826 F.2d 320 (5th Cir. 1987) *cert. denied*, 284 U.S. 1030, 108 S.Ct. 732 8

Central States Transport, Inc. v. Central States, Southeast and Southwest Areas Pension Fund, 816 F.2d 678 (6th Cir. 1987)..... 10

Flying Tiger Line v. Teamster Pension Fund of Philadelphia, 830 F.2d 1241 (3rd Cir. 1987).....8, 10

Grand Union Co. v. Food Employers Labor Relations Assn., 808 F.2d 66 (D.C. Cir. 1987) 8

IAM National Pension Fund v. Clinton Engines, 825 F.2d 415 (D.C. Cir. 1987).....7, 8

ILGWU National Retirement Fund v. Levy Bros. Frocks, 846 F.2d 836 (2nd Cir. 1988) 7

Laborers Health and Welfare Trust Fund for Northern California, et al. v. Advanced Lightweight Concrete Co., Inc., 484 U.S. 539, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988)..... 1, 4, 5

Marvin Hayes Line, Inc. v. Central States Pension Fund, 814 F.2d 297 (6th Cir. 1987) 8

Mason and Dixon Tank Lines v. Central States Pension Fund, et al., 852 F.2d 156 (6th Cir. 1988) ..8, 10

Robbins v. Admiral Merchants Motor Freight Co., 846 F.2d 1056 (7th Cir. 1988)..... 8

Teamsters Pension Fund v. McNicholas Transportation Co., 848 F.2d 20 (2nd Cir. 1988)..... 7

TABLE OF AUTHORITIES – Continued

Page

The Park South Hotel v. New York Hotel Trades Council, 851 F.2d 578 (2nd Cir. 1988), *cert. denied*, 488 U.S. 966, 109 S.Ct. 493, 102 L.Ed.2d 530 (1988) 11

Western Teamsters Fund v. Allyn Transportation Co., 832 F.2d 504 (9th Cir. 1987) 8, 9

MISCELLANEOUS

Multiemployer Pension Plan Amendment Act of 1980 (MPPAA), 29 U.S.C. § 1381 ..... 1, 5

Section 3(37)(a) of ERISA, 29 U.S.C. § 1002(37)(a) 2

Section 4221(b) of ERISA (29 U.S.C. § 1401(1)) 6

§§ 502(g)(2) and 515 of ERISA (29 U.S.C. § 1132(g)(2) and 29 U.S.C. § 1145) 5

§§ 4201 through 4281 of ERISA (29 U.S.C. §§ 1381-1441) 6

§ 4301(c) of ERISA (29 U.S.C. § 1451(c)) 5, 6

29 U.S.C. § 1398 3

§ 4219(b)(1) of ERISA (29 U.S.C. § 1399(b)(1)) 2, 3

§ 4219(b)(2) of ERISA (29 U.S.C. § 1399(b)(2)) 3

§ 4221 of ERISA, (29 U.S.C. § 1401) (Paragraph L) ... 3, 9

§ 4221(a)(1) of ERISA (29 U.S.C. § 1401(a)(1)) 6

§ 4221(b)(1) of ERISA (29 U.S.C. § 1401(b)(1)) 6

JURISDICTION

The Respondents do not dispute the jurisdiction of this court.

STATEMENT

A. PREFATORY REMARKS

This action did not arise out of a labor dispute. The Pension Fund did not assert any claim before the NLRB, and neither the Trustees nor the Pension Plan were party to any NLRB proceedings. Furthermore, the Co-Defendant, Howard Systems, Inc., was not a party to any of the proceedings before the NLRB. This action arose out of the Petitioner's withdrawal from the Pension Plan.

B. NATURE OF THE CASE AND SUMMARY OF RELEVANT FACTS

The Trustees[1] of the Colorado Pipe Industry Pension Fund (hereinafter referred to as "Trustees") brought this action against the Petitioners (herein referred to collectively as "Howard") to recover their share of the unfunded, vested liability benefits under the pension plan. The basis of such liability is the Multi-employer Pension Plan Amendment Act of 1980 (MPPAA), 29 U.S.C. § 1381, *et seq.*[2]

---

[1] The Trustees were correctly identified on page ii of Petition for Writ of Certiorari.

[2] A cause of action of recover delinquent contributions for pension, health, and other benefits was voluntarily dismissed by the Plaintiffs after the court's decision of *Laborers Health and Welfare Trust of Northern California, et al. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 98 L.Ed.2d 936, 108 S.Ct. 830 (1988).

The Pre-trial Order set forth in the appendix hereto, A16-39, contained a number of stipulations, which are set forth in Section IV thereof (A22-25). [Reference herein to this stipulation will be by the lettered paragraphs in Section IV of that Order.]

The Pension Fund is a multi-employer plan within the meaning of Section 3(37)(a) of ERISA, 29 U.S.C. § 1002(37)(a). (See Paragraph A). Howard Electrical and Mechanical, Inc., a wholly-owned subsidiary of Howard Systems, Inc. (Paragraph D), had collective bargaining agreements with two of the unions covered by the plan, Local Union No. 3 and Local Union No. 208, and under these agreements, contributed into the plan for its covered employees (Paragraph E). The last contract between Howard and the unions expired on May 31, 1983; however, after termination they continued to negotiate, but reached an impasse on December 31, 1983 (Paragraph F). Thereafter, Howard unilaterally implemented an impasse offer under which it paid pension contributions for journeyman plumbers and pipefitters then in its employ. Those journeymen were terminated by Howard on December 31, 1984 (Paragraph G), and Howard as of that date ceased all contributions to the plan. Howard continued, however, to do work within the jurisdiction covered by the plan, but made no further payments, though it did tender contributions in 1987 which were rejected by the Plaintiff Trustees (Paragraphs G & H).

On May 29, 1986, the Plaintiffs notified Howard, pursuant to § 4219(b)(1) of ERISA (29 U.S.C. § 1399(b)(1)) that the Trustees had determined that Howard had withdrawn from the plan on December 31, 1984 (the date they ceased making contributions) and demanded withdrawal

liability in the sum of $555,852, payable in installments (Paragraph J). That demand letter to Howard is set forth in the Appendix (A40-43). Howard requested a review of that termination of liability, pursuant to § 4219(b)(2) of ERISA (29 U.S.C. § 1399(b)(2)) in a letter dated July 17, 1986. Said letter is set forth in the Appendix (A44-48). The Trustees responded to Howard's request for review of their determination of liability, and advised them of their right to arbitrate should they so desire to do so. That letter is set forth in the Appendix (A49-52). Howard did not request arbitration of the Plaintiff's assessment of withdrawal liability, as provided under § 4221 of ERISA, (29 U.S.C. § 1401) (Paragraph L).

After Howard failed to arbitrate the dispute as required and failed to pay, the Plaintiffs brought this action pursuant to § 4221(b)(1) of ERISA (29 U.S.C. § 1401(b)(1)).

The Amended Complaint setting forth the claim is set forth in the Appendix (A1-8). Howard in its answer (Appendix A9-14) denied it withdrew on account of a settlement agreement it made with the NLRB; that it had suspended payments during a labor dispute under 29 U.S.C. § 1398, and that the claim for withdrawal liability was barred by a decision of an Administrative Law Judge in a case pending before the NLRB (which decision was subsequently reversed by the Board).

C. SUMMARY OF PROCEEDINGS BELOW

On cross-motions for summary judgment the District Court dismissed the Plaintiffs' Complaint. On appeal to the Tenth Circuit, the Circuit Court reversed the lower

court, and directed judgment be entered in favor of the Trustees on its Complaint.

SUMMARY OF ARGUMENT

A. THE DECISION OF THE CIRCUIT COURT BELOW IS CONSISTENT WITH THIS COURT'S OPINION IN *LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, ET AL. V. ADVANCED LIGHTWEIGHT CONCRETE CO., INC., SUPRA*, THE STATUTORY SCHEME FOR THE DETERMINATION AND ENFORCEMENT OF WITHDRAWAL LIABILITY AND ALL OF THE CIRCUITS WHICH HAVE RESOLVED THE ISSUE THAT THE COURT BELOW HAD BEFORE IT.

ARGUMENT

A. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S DECISION IN *LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, ET AL. V. ADVANCED LIGHTWEIGHT CONCRETE CO., INC.*

The issue before this court in *Laborers Health and Welfare Trust Fund for Northern California, et al. v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988) was whether or not Congress conferred upon the federal courts jurisdiction in actions brought to collect fringe benefit contributions that may be due after the contract has expired. After a careful review

of §§ 502(g)(2) and 515 of ERISA (29 U.S.C. § 1132(g)(2) and 29 U.S.C. § 1145) this court determined that no such jurisdiction was granted.

This court, however, recognized the difference between a liability for post-contract contributions and withdrawal liability under § 4301 of ERISA, 29 U.S.C. § 1381. Furthermore, this court in its Footnote 19 acknowledged that Congress expressly provided jurisdiction in federal court actions for withdrawal liability, even if the court had to resolve whether or not an impasse had occurred. The court noted:

> "It is true, as petitioners point out, that the district courts may find it necessary to decide whether an impasse occurred in withdrawal liability cases in which there is a dispute over the date of withdrawal."
>
> *Laborers Health and Welfare Trust Fund for Northern California, et al. v. Advanced Lightweight Concrete Co., Inc. supra at pg. 552.*

The Tenth Circuit below recognized that this particular action was not a suit to collect contributions, and therefore this action did not fall within the jurisdictional limitations set forth in *Laborers Health and Welfare Trust Fund for Northern California, et al. v. Advanced Lightweight Concrete Co., Inc.* case. It noted further that this court determined that *Advanced Lightweight Concrete* involved a "narrow category of suits", the liability for which arose under the NLRA, whereas the Trustees' claim was created by Congress in 29 U.S.C. § 1381 which "explicitly vested federal courts with jurisdiction" (Petition Appendix A13).

B. THE DECISION BELOW WAS CONSISTENT WITH THE STATUTORY SCHEME.

Section 502(g)(2) and Section 515 of ERISA, which were the subject of the *Laborers Health and Welfare Trust Fund for Northern California, et al. v. Advanced Lightweight Concrete Co., Inc.* case, were part of ERISA as adopted in 1974. The MPPAA Amendments enacted by Congress in 1980 adopted a different statutory scheme for the determination and enforcement of withdrawal liability. These are set forth in §§ 4201 through 4281 of ERISA (29 U.S.C. §§ 1381-1441) and § 4301 of ERISA (29 U.S.C. § 1451). In that scheme Congress provided in § 4221(a)(1) of ERISA as follows:

> "Any dispute between an employer and the plan sponsor of a multi-employer plan concerning a determination made under §§ 4201-4219 shall be resolved through arbitration."

Furthermore, whereas here the employer failed to seek to have the dispute arbitrated, an action could be brought in a state or federal court. § 4221(b)(1) provides:

> "If no arbitration proceeding has been initiated pursuant to Subsection (a) the amounts demanded by the plan sponsor under § 4219(b)(1) shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in state or federal court of competent jurisdiction for collection."

Congress further provided in § 4301(c):

> "The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in

> controversy, except that state courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability."

This statutory scheme of MPPAA makes it clear that even though Congress withheld jurisdiction of the federal courts in post-contract contribution collection cases, it provided first for the arbitration of "*any* dispute", and that the federal courts have to enforce that liability. The Petitioner has not directed this court to any provision of MPPAA Amendments from which, either directly or by inference, there is any exception to the scheme to, first, arbitrate these disputes, and to give federal courts jurisdiction to enforce liability if the employer fails to arbitrate.

As discussed below, the circuit courts have uniformly held that if any employer fails to arbitrate, it waives any defense it may have to the assessment of withdrawal liability, except for certain narrow exceptions not present here.

C. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS.

It is now uniformly recognized that this clear and unambiguous Congressional declaration that "any dispute between an employer and the plan sponsor . . . shall be resolved through arbitration" is mandatory, and is a remedy that an employer is required to exhaust. *IAM National Pension Fund v. Clinton Engines*, 825 F.2d 415 (D.C. Cir. 1987); *Teamsters Pension Fund v. McNicholas Transportation Co.*, 848 F.2d 20 (2nd Cir. 1988); *ILGWU National Retirement Fund v. Levy Bros. Frocks*, 846 F.2d 836

(2nd Cir. 1988); *Central States Pension Fund v. Time D.C.*, 826 F.2d 320 (5th Cir. 1987) *cert. denied*, 284 U.S. 1030, 108 S.Ct. 732; *Flying Tiger Line v. Teamster Pension Fund of Philadelphia*, 830 F.2d 1241 (3rd Cir. 1987); *Marvin Hayes Line, Inc. v. Central States Pension Fund*, 814 F.2d 297 (6th Cir. 1987); *Mason and Dixon Tank Lines v. Central States Pension Fund, et al.*, 852 F.2d 156 (6th Cir. 1988); *Robbins v. Admiral Merchants Motor Freight Co.*, 846 F.2d 1056 (7th Cir. 1988); *Western Teamsters Fund v. Allyn Transportation Co.*, 832 F.2d 504 (9th Cir. 1987).

In *IAM National Pension Fund v. Clinton Engines Corp., supra*, the court had before it the defense that the employer had no obligation to arbitrate because the issue involved a statutory interpretation. The court noted:

> "Thus, Congress' directive is clear. *Any* dispute over withdrawal liability as determined under the enumerated statutory provisions *shall* be arbitrated. Judicial consideration of the disputes is then contemplated in the context of an action by any of the parties to arbitration to "enforce, vacate or modify the arbitrator's award". (Emphasis supplied by the Court).

That same court had earlier decided in *Grand Union Co. v. Food Employers Labor Relations Assn.*, 808 F.2d 66 (D.C. Cir. 1987):

> "Arbitrate first" is indeed a rule Congress stated unequivocally.
>
> . . . .
>
> Initial recourse to arbitration is a statutory direction, one generally to be followed unless neither party timely presses the plea in abatement and the court finds that deferring a court contest while the parties repair to arbitration

> "will neither lead to the application of superior expertise nor promote judicial economy" (at p. 70).

The court, in the most succinct language added:

> In short, arbitration reigns supreme under the MPPAA. And the consequences of failing to arbitrate pursuant to Section 1401(a)(1), 29 U.S.C. § 1401(a)(1), "any dispute concerning a determination made under Section 1381 through 1399" are clearly enunciated by the statute (at page 422).

Section 4221(b) of ERISA (29 U.S.C. § 1401(b)) provides, in pertinent part that if no arbitration proceeding has been initiated pursuant to Section (a) of this Section, the amounts demanded by the plan sponsor "shall be due and owing." The court noted that under this statutory scheme, it was compelled to remand the case before it with instruction to enter judgment in favor of the Trustees, stating:

> "Having failed to initiate arbitration, these employers were barred from raising their defenses in collection actions brought by the fund (at p. 429)."

The Ninth Circuit case of *Western Teamsters Pension Fund v. Allyn, supra,* considered the same issue the Petitioners raise here. The Defendants claimed they had suspended payments pending a labor dispute. The court stated those issues could have and should have been submitted to arbitration, and the failure to do so precluded these employers from raising defenses in the enforcement action.

The Petitioners are mistaken in their claim that the decision below is contrary to the decisions in other circuits. They have not and cannot cite any case from any circuit that either criticizes or fails to follow any of the cases cited above. They lamely cite on page 18 the per curium decision (no opinion) of *Central States Transport, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 816 F.2d 678 (6th Cir. 1987), and *Mason Dixon Tank Lines v. Central States Pension Fund, et al.*, 852 F.2d 156 (6th Cir. 1988). The later Third Circuit case of *Flying Tiger Line v. Teamster Pension Fund of Philadelphia, supra*, distinguished its earlier per curiam order in the *Central States Transport* case, noting that the earlier case involved a party who was never involved in the pension plan (830 F.2d, at 1251).

The contention that the decision below was contrary to the *Mason and Dixon Tank Lines* case is even more tenuous. The Court, at 852 F.2d 163, stated the following:

> "Under the MPPAA, arbitration is not a jurisdictional prerequisite for district court review. *Robbins v. Admiral Merchants Motor Freight, Inc.*, 846 F.2d 1054, 1056 (7th Cir. 1988); *Central States Southeast and Southwest Areas Pension Fund v. T.I.M.E.-DC, Inc.*, 826 F.2d 320, 325-28 (5th Cir. 1987); *I.A.M. National Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415, 417 & n. 4 (D.C. Cir. 1987). Nevertheless, it is the preferred method of dispute resolution under the MPPAA, and normally the initial step preceding judicial intervention. The language of section 1401(a)(1) makes this clear by stating that "[a]ny dispute between an employer and the plan sponsor of a multi-employer plan concerning a determination made under sections 1381 through 1399 of this title *shall* be resolved

through arbitration." (emphasis added). *Clinton Engines*, 825 F.2d at 417.

The Court then went on to discuss that certain narrow exceptions to this rule, i.e. "facial constitutional challenge", a verifiable claim of irreparable injury (at pg. 165) and a challenge made directly to District Court to determine if a company is "an employer" within the meaning of the act (at p. 167). The petitioners do not assert here and did not assert below that they fell into these exceptions.

The case of *The Park South Hotel v. New York Hotel Trades Council*, 851 F.2d 578 (2nd Cir. 1988), *cert. denied*, 488 U.S. 966, 109 S.Ct. 493, 102 L.Ed.2d 530 (1988) is also mistakenly relied upon. The court set forth four conditions, enumerated on pg. 20 of the Petition that were present which there obviated the requirement to arbitrate. None of those conditions are present here.

In none of the cases cited by the Petitioners did the court squarely face the issue raised below; that is, can an employer covered by MPPAA ignore the statutory requirement to arbitrate and then subsequently assert in an enforcement action defenses that could have been raised in the arbitration. As we have demonstrated above, that question has uniformly been answered "no".

Finally, it is unfair for the petitioners to contend that the Tenth Circuit's opinion is contrary to the decisions in other circuits dealing with "equitable tolling". The petitioners in the court below did not seek an equitable tolling of the arbitration requirement, did not allege that arbitration was tolled in its Answer nor was equitable tolling raised as a claim in the Pretrial Order. This was

raised for the first time in the Petition for Rehearing, and was suggested to the Petitioners by the Tenth Circuit itself when it observed that had the Petitioner submitted the issue to arbitration, that arbitrator "may, in his discretion, elect to stay proceedings pending resolution of a prior NLRB action." (Appendix A-17 of the Petition).

CONCLUSION

By reason of the foregoing, the Respondent urges that the Petition for Writ of Certiorari be denied.

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APPENDIX TO BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

Amended Complaint in the United States District Court for the District of Colorado A1

Answer to Amended Complaint in the United States District Court for the District of Colorado A9

Pretrial Order in the United States District Court for the District of Colorado..... A16

Letter from Colorado Pipe Benefit Trust Funds to Defendant dated May 29, 1986..... A40

Letter from James P. Hendricks, Kaplan, Jacobwitz, Byrnes, Rosier & Hendricks to the Board of Trustees of the Colorado Pipe Industry Pension Fund dated July 17, 1986 ..... A44

Letter from James C. Fattor to James P. Hendricks dated September 24, 1986..... A49

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 86-M-2561

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, an express trust, TRUSTEES OF THE COLORADO PIPE INDUSTRY INSURANCE TRUST, an express trust, TRUSTEES OF THE COLORADO PIPE INDUSTRY VACATION FUND, an express trust, PLUMBERS LOCAL UNION NO. 3, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, and PIPEFITTERS LOCAL NO. 208, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTINGS INDUSTRY OF THE UNITED STATES AND CANADA,

Plaintiffs,

vs.

HOWARD ELECTRICAL AND MECHANICAL, INC., a Colorado corporation, HOWARD SYSTEMS, INC., a Colorado corporation, and JCON, Inc., a Colorado corporation,

Defendants.

AMENDED COMPLAINT

The Plaintiffs, for a cause of action against the Defendants, state and allege:

JURISDICTION

1. This is an action brought pursuant to Title IV of the Employee Retirement Income Security Act of 1974, as amended [29 U.S.C. § 1331, *et seq.*].

2. This Court has jurisdiction over this action pursuant to 29 U.S.C. §§ 1145, 1401(b), and 1459 and 28 U.S.C. § 1331.

PARTIES

3. The Plaintiffs are Trustees of the Colorado Pipe Industry Insurance Fund, the Plumbers and Pipefitters Vacation Fund, and the Colorado Pipe Industry Pension Fund, Denver Plumbers Joint Apprentice and Journeyman Training Fund, and the Denver Pipefitters Apprentice and Journeyman Training Fund, each of which is an express trust established and existing for the purpose of providing medical and hospital insurance, vacation pay and benefits, and retirement benefits for employees in the Pipe Industry in Colorado and for training plumbing and pipefitting skills. Each of the said employee benefit funds is a multi-employer plan within the meaning of ERISA [29 U.S.C. § 1002(37)(a)], and the Plaintiff Trustees are beneficiaries of said plans under Section 402(a) of ERISA [29 U.S.C. § 1102(a)].

4. Each of the fringe benefit funds is administered within the State of Colorado and the District of Colorado is the proper venue for this action under Section 502(e)(2) of ERISA [29 U.S.C. § 1132(e)(2)].

5. The Defendant Howard Electrical and Mechanical, Inc., (hereinafter "Howard Mechanical") is a corporation organized and existing under the laws of the State of Colorado and is in an industry affecting commerce as that term is defined in Section 501(1) of the Labor-Management Relations Act of 1947 [29 U.S.C. § 142(1)].

6. The Defendants Howard Systems, Inc. (hereinafter "Howard Systems") and JCON, Inc. are corporations organized and existing under the laws of the State of Colorado and, pursuant to Section 4001(b)(1) of ERISA [29 U.S.C. § 1301(b)(1)], are, with respect to the claim of the Trustees of the Colorado Pipe Industry Pension Fund, deemed to be within a controlled group, and thus each is responsible for the withdrawal liability alleged in the Second Claim.

FIRST CLAIM FOR RELIEF – CLAIM FOR DELINQUENT PAYMENTS

7. On or about January 1, 1984, after reaching an impasse with Plumbers Local Union No. 3 and Pipefitters Local Union No. 208, the Defendant Howard Electrical and Mechanical, Inc. (hereinafter referred to as "Howard") unilaterally implemented the last offer that it had made to these Unions prior to impasse. In that offer, it agreed to pay certain fringe benefits, pension, health and welfare, and vacation benefits and payments into the apprenticeship training funds on behalf of journeymen performing work covered by the contract.

8. Beginning in April of 1984, the Defendant Howard hired a number of journeymen plumbers and journeymen pipefitters to work for it on several projects and to

perform work requiring the skill of licensed and certified journeyman.

9. On or about July 1, 1984, based upon a continuing impasse, the Defendant Howard implemented a new offer, hereinafter referred to as "impasse offer", which provided for the continuation of pension benefits, health insurance benefits, and vacation benefits to journeymen plumbers and pipefitters. The said impasse offer remained in effect until August 20, 1984, at which time modifications of the impasse offer of the Defendant were unilaterally imposed. These modifications terminated the Defendant's obligation to contribute to the Colorado Pipe Industry Pension Fund and declared that it put in its place an optional company profit sharing plan and group medical plan.

10. Between April 1, 1984 and August 20, 1984, the Plaintiffs are informed and believe that the Defendant Howard hired six to eight journeymen plumbers and/or pipefitters. The exact number of persons so hired and the number of hours worked is not known to the Plaintiffs at this time. The Defendant did agree to pay for each hour worked by such persons to the Funds the following:

> To the Colorado Pipe Industry Insurance Fund, $1.25 per hour worked;
>
> To the Colorado Pipe Industry Pension fund, $1.75 per hour worked; and
>
> To the Vacation Fund, the sum of $1.30 per hour worked.

11. The Defendant agreed to pay 13¢ per hour into the apprentice and training fund. As a subterfuge and

motiviated [sic] solely by its desire to conceal its obligation to pay fringe benefits, the Defendant Howard, in violation of its obligation to comply with its impasse offer, classified each of the journeymen hired by it as a pre-apprentice. Under the terms of its impasse offer, only persons who performed work that did not require all of the skills of a journeyman could be classified as pre-apprentices.

12. An audit by a qualified professional accountant is necessary to determine the amount owned by the Defendant.

13. Under the provisions of Section 502(g)(2) of ERISA [29 U.S.C. § 1132(g)(2)], the Plaintiff Trustees are entitled to a judgment against the Defendant Howard Mechanical for an amount to be determined upon an adequate audit, together with interest and attorney's fees.

WHEREFORE, the Plaintiffs as relief for their First Claim pray for judgment as follows:

A. That an order be entered directing the Defendant Howard Electrial [sic] and Mechanical, Inc. to authorize an audit of its books and records to determine the date of hire, wage paid, and work performed by all persons employed by it and performing any plumbing and/or pipefitting work between April 1 and August 20, 1984.

B. That judgment be entered in favor of the Plaintiffs and against the Defendant, Howard Electrical and Mechanical, Inc. for such contributions as an audit shall determine, plus interest.

C. That the Plaintiffs be awarded attorney's fees, costs and such other relief as the Court shall deem just.

SECOND CLAIM – WITHDRAWAL LIABILITY

14. The Plaintiffs reallege and incorporate herein the allegations set forth in Paragraphs 1 through 13 above.

15. Defendant Howard was a party a certain collective bargaining contracts and trust agreements with Unions engaged in the plumbing and pipefitting industry within the State of Colorado, and, under the terms and provisions of the collective bargaining contracts and trust agreements, the Defendant had an obligation to pay pension contributions to the Plaintiffs in an amount specified for each hour worked by each of the Defendant's employees.

16. The last contract to which Defendant Howard was a party expired on May 31, 1983, however its obligation to continue payments into the pension fund continued until the parties reached an impasse, which occurred on December 31, 1983. Thereafter, the Defendant unilaterally implemented several impasse offers, the last of which was on or about August 20, 1984, at which time it ceased its obligations to the fund except with respect to two of its employees, both of whom were terminated by the Defendant on December 31, 1984.

17. The actions of the Defendant constitute a withdrawal from the multi-employer pension plan as withdrawal is defined by Section 4203(b) of ERISA [29 U.S.C. § 1383(b)].

18. Under Sections 4001(b)(1) and 4201 of ERISA [29 U.S.C. §§ 1301(b)(1) and 1381], each of the Defendants is

liable to the Plaintiff Trustees for its share of the unfunded vested benefits of the Plan.

19. Pursuant to Section 4211 of ERISA [29 U.S.C. § 1391] and Section 4202 of ERISA [29 U.S.C. § 1382], the Plaintiff Trustees determined that the Defendant has a withdrawal liability of $555,852.00, and the Plaintiff Trustees established a payment schedule which required that the liability of the Defendant be paid in ten (10) quarterly installments of $63,758.00 with a final payment of $46,814.00. The first quarterly payment was due on July 28, 1986, and the Defendant is now delinquent on the first four installment payments.

20. Defendant Howard was duly notified of the amount of this liability and the amount of its quarterly payments and was notified of its right to arbitrate its withdrawal liability if it chose to do so, but failed to request arbitration within the time required by ERISA [29 U.S.C. § 1399], and, by reason thereof, the first four installments are due and owing. By failing to pay the first four quarterly withdrawal liability payments, the Defendants are, therfore, [sic] delinquent in submitting contributions within the meaning of Sections 515 and 4221(b)(1) of ERISA [29 U.S.C. § 1145 and 29 U.S.C. § 1401(b)(1)]. The Plaintiffs, in bringing this action to enforce Section 515 and Section 4221 of ERISA, are entitled to a judgment against the Defendants for its four (4) unpaid withdrawal liability installments, with interest to the date of judgment, plus costs and expenses incurred in collecting such amounts, including attorney's fees, as provided in Sections 402(g)(2) and 4301 of ERISA [29 U.S.C. §§ 1132(g)(2) and 1451].

WHEREFORE, Plaintiff Trustees pray for judgment in favor of the Plaintiffs and against each of the Defendants in the sum of $255,032.00, plus interest to the date of judgment, such additional sums as the Defendants may owe by reason of future installments, court costs, attorney's fees, other expenses in connection with the collection of this claim, and such other legal and equitable relief as the Court shall deem just and proper.

Respectfully submitted,
HORNBEIN, MacDONALD, AND FATTOR, P.C.

By /s/ James C. Fattor
James C. Fattor, No. 2023
Attorneys for Plaintiffs
1600 Broadway, Suite 1900
Denver, Colorado 80202
Telephone: 861-7070

Plaintiffs' Addresses:

Colorado Pipe Industry Fringe Benefits Funds
1331 Tremont Place, Suite 201
Denver, CO 80204

Plumbers Local Union No. 3
360 Acoma Street
Denver, CO 80223

Pipefitters Local Union No. 208
6350 N. Broadway
Denver, CO 80216

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-M-2561

THE TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION FUND, an express trust, TRUSTEES OF THE COLORADO PIPE INDUSTRY INSURANCE TRUST, an express trust, TRUSTEES OF THE COLORADO PIPE INDUSTRY VACATION FUND, an express trust, PLUMBERS LOCAL UNION NO. 3, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, and PIPEFITTERS LOCAL NO. 208, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA,

Plaintiff,

vs.

HOWARD ELECTRICAL & MECHANICAL, INC., a Colorado corporation, HOWARD SYSTEMS, INC., a Colorado corporation, and JCON, INC., a Colorado corporation,

Defendant.

ANSWER TO AMENDED COMPLAINT

Defendants Howard Electrical and Mechanical, Inc., and Howard Systems, Inc., answer the Amended Complaint as follows:

FIRST DEFENSE

JURISDICTION

1. Deny.

2. Deny.

PARTIES

3. Defendants have insufficient information to form a belief as to the truth of the averments herein and therefore deny the same.

4. Defendants have insufficient information to form a belief as to the truth of the averments herein and therefore deny the same.

5. Admit.

6. Deny as to Defendant Howard Systems, Inc., except admit that it is a corporation organized and existing under the laws of the State of Colorado. Defendants have insufficient information with respect to the named Defendant JCON, Inc., to form a belief as to the truth of the averments with respect thereto, and therefore deny the same.

FIRST CLAIM FOR RELIEF –
CLAIM FOR DELINQUENT PAYMENTS.

7. Admit.

8. Deny.

9. Deny.

10. Deny.

11. Deny.

12. Deny.

13. Deny.

SECOND CLAIM - WITHDRAWAL LIABILITY

14. The Defendants incorporate as their answer hereto the answers set forth in paragraphs 1 through 13 above.

15. Admit.

16. Admit that the last contract to which Defendant Howard Electrical & Mechanical, Inc., was a party expired on May 31, 1983. Deny all other allegations in paragraph 16 of the Amended Complaint.

17. Deny.

18. Deny.

19. Deny.

20. Admit that Defendant Howard Electrical & Mechanical Inc. was notified of the asserted amount of the claimed liability, a copy of which notice is attached to the Answer to the original Complaint herein and is incorporated herein by this reference, and admits that it did not request arbitration, but deny each and every other allegation contained in paragraph 20 of the Amended Complaint. Defendants affirmatively state that Defendant Howard Electrical & Mechanical, Inc. had and has no legal obligation to request arbitration.

SECOND DEFENSE

The Amended Complaint fails to state a claim against the Defendants in either or both of the First and Second Claims for Relief upon which relief can be granted.

THIRD DEFENSE

With respect to the Second Claim-Withdrawal Liability in the Amended Complaint, the obligation of Howard Electrical & Mechanical, Inc. to contribute under the Plan has not ceased. Consequently, there has not been a withdrawal from the Plan by the Defendant as defined by 29 U.S.C. § 1383(b); the provisions of 29 U.S.C. §§ 1391, 1382, 1399, 1145 and 1401 are inapplicable; and Plaintiff is not entitled to the relief sought herein.

The reasons Defendant's obligation to contribute under the Plan has not ceased include, but are not limited to, the following:

(a) The Defendant enter into a settlement agreement approved by the National Labor Relations Board in October 1984, which required Defendant to make all contributions called for by the Plan notwithstanding the expiration of the collective bargaining agreement on May 31, 1983;

(b) Pursuant to the settlement agreement, Defendant paid arrearages to the Plan through November 1984, and paid pension benefits for two of its employees performing covered work through December 31, 1984;

(c) The settlement agreement is still in full force and effect;

(d) Any suspension of contributions by Defendant under the Plan has occurred during a labor dispute involving Defendant's employee. Pursuant to 29 U.S.C. § 1398, the Defendant shall not be considered to have withdrawn from the Plan solely because it suspended contributions to the Plan during such labor dispute;

(e) Such labor dispute is continuing as of this date; and

(f) The Defendant has not taken any definite steps to cease participating in the Plan.

FOURTH DEFENSE

There now exists a collective bargaining agreement between Pipefitters, Local Union No. 208, and Plumbers, Local Union No. 3, pursuant to which Defendant Howard Electrical & Mechanical Inc.'s obligations under the Plan continue to exist.

FIFTH DEFENSE

Any withdrawal liability as claimed in the Second Claim-Withdrawal Liability, against the Defendant under the Plan has been waived, reduced or abated pursuant to 29 U.S.C. § 1387, and the regulations and rules prescribed and adopted in accordance therewith.

SIXTH DEFENSE

Plaintiffs are collaterally estopped from denying the validity of the lawful proposals for and implementation of terms at impasse in collective bargaining negotiations

between Howard Electrical & Mechanical, Inc. and Pipefitters Local Union No. 208 and Plumbers Local Union No. 3, as set forth in the decision of Federal Administrative Law Judge Jerold H. Shapiro, dated April 8, 1987. The said decision of said Administrative Law Judge confirms the lawful implementation of its pre-impasse offer permitting it to classify employees as pre-apprentices, employ pre-apprentices in any work they have the skills and ability to perform, without limitation, and concerning whom the obligation to make Plan contributions during the impasse period was suspended, and which confirmed the legality of such conduct under the National Labor Relations Act, as amended, 29 U.S.C. § 158, *et seq.*

WHEREFORE, Defendants pray that the Complaint and both the First and Second Claims for Relief be dismissed with prejudice, and that Defendants be awarded their costs, reasonable attorney's fees, and for such other and further relief as the Court may deem proper.

Respectfully submitted,

BRADLEY, CAMPBELL & CARNEY
Professional Corporation

By /s/ Earl K. Madsen
Earl K. Madsen
1717 Washington Avenue
Golden, Colorado 80401
(303) 278-3300

Attorneys for Defendant

Defendants' Address:

6701 West Alameda Avenue
Denver, Colorado 80226

CERTIFICATE OF MAILING

I hereby certify that on this 6th day of October, 1987, I have placed a true and correct copy of the foregoing ANSWER TO AMENDED COMPLAINT in the United States mail, first-class postage prepaid, properly addressed to:

James C. Fattor, Esq.
Hornbein, MacDonald and Fattor, P.C.
1600 Broadway, Suite 1900
Denver, Colorado 80202

/s/ _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-M-2561

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, an express trust, et al.,

Plaintiffs,

vs.

HOWARD ELECTRICAL AND MECHANICAL, INC., a Colorado corporation, et al.,

Defendants.

PRE-TRIAL ORDER

(Filed April 18, 1988)

I. DATE AND APPEARANCES

The pre-trial conference before Magistrate Richard B. Harvey was scheduled for March 15, 1988, at 10:15 a.m., at which time the schedule for submission of this Pre-Trial Order was established for March 30, 1988. Plaintiffs' counsel is James C. Fattor of Hornbein, MacDonald & Fattor, P.C. Defendants' counsel is Earl K. Madsen of Bradley, Campbell & Carney.

II. JURISDICTION

Jurisdiction of this Court over this proceeding under Title IV of the Employee Retirement Income Security Act of 1974, as amended, 20 U.S.C. § 1331, and in particular section 1132(g)(2) (section 502(g)(2)), 1145 (section 515) is contested by Howard. Howard submits the instant claims

are preempted and collaterally estopped by the pending National Labor Relations Act proceedings.

III. CLAIMS AND DEFENSES

A. Plaintiffs' Claims

Defendant Howard Electrical & Mechanical, Inc., (hereinafter referred to as "Defendant Howard") was a signatory to several collective bargaining agreements with Plumbers Local Union No. 3 and Pipefitters Local Union No. 208 of Denver, Colorado (hereinafter referred to as the "Unions"). Those union contracts, which had incorporated within them certain trust agreements providing for health and welfare, pension and vacation benefits for persons covered by the contracts, obligated Defendant Howard to pay fringe benefit contributions into the Insurance Fund, the Pension Fund and the Vacation Fund. The last contract signed by Defendant Howard expired on May 31, 1983. Negotiations for a new contract reached an impasse on December 31, 1983, at which time the Defendant implemented its last offer (hereinafter referred to as its "impasse offer"). Under that offer, the Defendant was obligated to make pension benefit contributions for journeymen plumbers and pipefitters then in its employ; but, under that offer, had no obligation to make any contributions for such benefits to journeymen subsequently hired by the Defendant. On December 31, 1984, Defendants Howard Terminated the employment of the three (3) journeymen employed by the Defendant at that time the Defendant imposed its impasse offer and has made no further contributions.

Pursuant to the provisions of sections 1402 and 1411 of ERISA, 29 U.S.C. §§ 1382 and 1391, respectively, the Trustees of the Pension Fund determined that the Defendant had withdrawn from the Fund and that there was unfunded vested liabilities it owed in the amount of $555,852.00, payable in quarterly installments of $63,758.00, with a final installment of $46,814.00. The Defendant has failed to make any payments. Although the statute gives the Defendant the right to arbitration of all issues between the parties, the Defendant chose not to seek an arbitration. It has made no quarterly payments and has refused to pay any part of the withdrawal liability.

The Plaintiffs also brought this action against Howard Systems, Inc., and JCON, Inc. (designated as "JACORE, Inc., in the Amended Complaint), under section 4001(b)(1) of ERISA, 29 U.S.C. § 1301(b)(1), as corporations within a control group and, thus, liable under the statute. Defendant Howard is a wholly-owned subsidiary of Howard Systems, Inc., and thus, the latter is liable under this section of the statute. The Plaintiffs hereby dismiss any claim against JCON, Inc.

The Plaintiffs also seek to recover delinquent contributions covering a short period of time, from July 1, 1984, to August 20, 1984. This claim is based upon Defendant Howard's modified impasse offer of July 1, 1984, in which the Defendant agreed to make the following contributions: $1.25 per hour worked to the Colorado Pipe Industry Insurance Fund, $1.75 per hour worked to the Colorado Pipe Industry Pension Fund, and $1.30 per hour worked to the Colorado Pipe Industry Vacation Fund. In addition, the Defendant agreed to withhold and pay to

the unions working dues for its journeymen. On August 15, 1984, the Defendant again modified its impasse offer and ceased its obligation with respect to the payment of these fringe benefits. Consequently, the Plaintiffs seek to recover from the Defendant health, welfare, pension and vacation contributions and union dues for journeymen hours worked for July 1, 1984, to August 20, 1984. The Plaintiffs request that the Court order an accounting of the Defendant's books and records for the purpose of determining the amount of this liability.

The Plaintiffs pray for a judgment against Defendant Howard in the sum of $555,852.00, plus interest and attorney's fees on the claim for withdrawal liability and, with respect to the claim for fringe benefits due for the period July 1, 1984, to August 20, 1984, the Plaintiffs demand that the Court order an audit to determine the amount of this liability and a judgment in the amount of the liability as determined by the audit, plus interest and attorney fees.

B. Defendants' Claims

This lawsuit is an effort by Plan Trustees to enforce the collective bargaining position of two unions, Plumbers Local Union No. 3 and Pipefitters Local No. 208 who in the past had collective bargaining agreements with Howard Electrical and Mechanical, Inc. ("Howard") which required fund contributions by Howard for covered employees. The Trustees have brought this suit on the theory that Howard did not bargain in good faith and unlawfully reached an impasse in collective bargaining negotiations with the two unions on or about August 20,

1984. Both the First and Second Claims for Relief in the Trustees' Complaint before this Court are based on this asserted unlawful bargaining under the National Labor Relations Act, as amended, 29 U.S.C. § 141, *et seq.*, by Howard.

Previously, the unions, Plumbers Local No. 3 and Pipefitters Local No. 208, submitted this identical claim for that identical alleged unlawful bargaining on the identical August 20, 1984, "facts," which claims were dismissed by the National Labor Relations Board ("NLRB") Administrative Law Judge, Shapiro, in April 1987. Judge Shapiro after full opportunity to litigate such claims, determined that there was no evidence of an unlawful implementation of the asserted Howard bargaining proposal of August 20, 1984, and dismissed the claims.

This action is a collateral attack upon that decision of Judge Shapiro. The decision of Judge Shapiro is currently pending on appeal to the National Labor Relations Board. Judge Shapiro's decision fundamentally confirmed the post-agreement expiration lawful bargaining of Howard with Plumbers Local No. 3 and Pipefitters Local No. 208 under the National Labor Relations Act. Further, the decision discusses the continuing bargaining engaged in by Howard with both said Locals, in the period 1985 and 1986, including proposals by Howard as early as July 1985 to break an impasse in bargaining between the parties on the basis of which Howard would be obligated to continue its contributions to the Plaintiff plans. Local Nos. 3 and 208 refused to accept the Howard proposals, unilaterally asserted their own "impasse" in negotiations

in August 1985, but have continued some negotiations with Howard to this date.

The action takes the form of legal proceedings under sections 502(g)(2) and 515 of ERISA to collect delinquent contributions, and withdrawal liability payments concerning the plans, based on the asserted unlawful bargaining engaged in by Howard in violation of the National Labor Relations Act. However, Howard has never defaulted on any promised contributions on the basis of any agreements with either of the local unions, and thus the Trustees have no basis under the cited sections of ERISA for such a claim of delinquent contributions. Further, the post-agreement expiration bargaining by Howard has been confirmed to be lawful under the National Labor Relations Act, and such negotiations as referenced in Judge Shapiro's Decision, have continued even to this date.

In summary, the position of Howard is that it has never defaulted on any promised contributions to the Fund. Further, for a time in the post-agreement expiration negotiation period, it suspended contributions to the Fund as is its right under ERISA, 29 U.S.C. § 1398(2). This provision expressly authorizes an employer to suspend contributions under the plan during a labor dispute involving its employees, and particularly in the post-agreement negotiation period. Howard has agressively [sic] bargained to attempt to obtain its proposals in negotiations, in 1985, and thereafter, and have proposed impasse breaking terms of agreement as early as July 1985 reestablishing in full its contribution obligations and payments.

Resolution of the claims asserted in the instant proceeding of unlawful bargaining by Howard under the National Labor Relations Act by alleged impasse proposals of August 20, 1984, are for the exclusive jurisdiction of the National Labor Relations Board, and not this Court under ERIRA. These claims asserted in this Court are preempted under and are subject to the exclusive jurisdiction of the National Labor Relations Board under the National Labor Relations Act, as amended.

IV. STIPULATIONS

A. The Colorado Pipe Industry Pension Fund is an express trust established and existing for the purpose of providing retirement benefits for employees in the plumbing and pipefitting industry in the State of Colorado. The Plaintiffs have, pursuant to law, established a pension plan, which is a multi-employer plan within the meaning of section 3(37)(a) of ERISA, 29 U.S.C. § 1002(37)(a), and the Plaintiff [sic] are named fiduciaries of the plan under section 402(a) of ERISA, 29 U.S.C. § 1102(a).

B. The Colorado Pipe Industry Insurance Fund is an express trust established and existing for the purpose of providing health and welfare benefits for employees in the plumbing and pipefitting industry in the State of Colorado. The Plaintiffs have, pursuant to law, established an insurance plan, which is a multi-employer plan within the meaning of section 3(37)(a) of ERISA, 29 U.S.C. § 1002(37)(a), and the Plaintiffs are named fiduciaries of the Plan under section 402(a) of ERISA, 29 U.S.C. § 1102(a).

C. Defendant Howard Electrical & Mechanical, Inc., is a corporation organized and existing under the laws of the State of Colorado, and it and its employees are in, and engaged in an industry affecting commerce as that term is defined by section 501(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 142(a).

D. Defendant Howard Systems, Inc., is a Colorado corporation which owns one hundred percent (100%) of the stock of Defendant Howard Electrical & Mechanical, Inc.

E. On May 1, 1981, Defendant Howard and Plumbers Local Union No. 3 and Pipefitters Local Union No. 208, both of Denver, Colorado (hereinafter referred to as the "Unions"), entered into a collective bargaining agreement, and a trust agreement incorporated therein (hereinafter referred to as the "contract"), requiring Defendant Howard to make pension contributions to the Colorado Pipe Industry Pension Plan at a specified rate for each hour worked by each of the Defendant's employees. These contracts expired on May 31, 1983.

F. After termination of the contract, both parties attempted to negotiate a new collective bargaining agreement, but were unable to do so and reached impasse on December 31, 1983, at which time the Defendant implemented its impasse offer.

G. Under its impasse offer, Defendant Howard made vacation, insurance and pension contributions to the Plans for journeymen plumbers and pipefitters in its employ as of and through December 31, 1984. On December 31, 1984, those journeymen, plumbers and pipefitters which had been in its employ as of the contract expiration

on December 31, 1983, (Messrs. Pike, Lansville and Murphy) left their employment with Howard. Howard thereafter made no payments to the Plaintiffs, except for tendered contributions, rejected by Plaintiffs in 1987.

H. Howard has continued, to the extent it successfully bid for and obtained work and it continues to bid for work, to perform work in the jurisdiction for which contributions were required under the terms of the previously expired collective bargaining agreement (May 31, 1983).

I. The Colorado Pipe Industry Pension Plan is a multi-employer pension plan within the meaning of section 3(37)(a) of ERISA, 29 U.S.C. § 1002(37)(a), established for the purpose of providing retirement benefits to employees in the plumbing and pipefitting industry in Colorado. The Plaintiff Trustees are named fiduciaries of the Colorado Pipe Industry Pension Plan under section 402(a) of ERISA, 29 U.S.C. § 1102(a).

J. The Plaintiffs determined that Defendant Howard had withdrawn, effective December 31, 1984, and they assessed withdrawal liability under section 4201 of ERISA, 29 U.S.C. a 1381, in the amount of $555,852.00 as of that date. On or about May 29, 1986, the Plaintiffs notified Defendant Howard of its claimed withdrawal liability and informed the Defendant that it was required to pay that withdrawal liability in ten (10) quarterly payments of $63,758.00, with a final payment of $46,814.00. The Plaintiff Trustees also notified Defendant Howard under their claims that its first quarterly payment was due on July 28, 1986.

K. Defendant Howard has made no payments towards the $552,852.00 in withdrawal liability billed by the Plaintiffs, and Howard states it has no such withdrawal liability since Howard responded to the Fund on July 17, 1986, that it had not withdrawn from the Fund or Plan.

L. Defendant Howard has made no request to arbitrate the Plaintiffs' assessment of withdrawal liability under ERISA, 29 U.S.C. § 1399. Howard states it had no duty or obligation to request such arbitration since it has not withdrawn from the Fund or Plan, since Howard claims the arbitrator is not empowered to engage in statutory construction of ERISA including the interpretation of the labor dispute provisions of that Act set forth in 29 U.S.C. § 1398(2), and because Howard claims the arbitrator is not empowered to determine issues of preemption of the asserted ERISA claims of the Trustees under the terms of the National Labor Relations Act and under the primary jurisdiction of the National Labor Relations Board.

M. If the Court finds that it has jurisdiction over these proceedings under ERISA, 29 U.S.C. § 1381, *et seq.*, then venue is proper in this Court.

V. PENDING MOTIONS

A. Filed by Plaintiffs:

1. Motion to Compel Payment of Delinquent and Future Installments of Withdrawal Liability Pursuant to 29 U.S.C. §§ 1399 and 1401, filed October ___, 1987.

2. Plaintiffs' Motion for Summary Judgment on Plaintiffs' Second Claim for Relief, filed December 11, 1987.

B. Filed by Defendant:

1. Motion for Summary Judgment, filed on or about April 29, 1987; Defendant Howard will submit its Supplemental Memorandum on or before May 1, 1988. Plaintiffs will submit a response to the Defendants' Motion on or before May 1, 1988.

VI. WITNESSES

A. Plaintiffs' Witnesses:

1. The Plaintiffs will call the following witnesses at trial:

a. Leon H. Land, Fund Administrator, Compusys, Inc. of Colorado, 1313 Tremont Place, Suite 201, Denver, Colorado 80204, telephone number (303) 595-4617.

2. The Plaintiffs may call the following witnesses at trial:

b. Jack Howard, President of Defendant Howard, 6701 West Alameda Avenue, Lakewood, Colorado 80226, telephone number (303) 232-1456, for cross-examination.

c. Stanley Plucheck and Roland Herdine, representatives of Defendant Howard, 6701 West Alameda Avenue, Lakewood, Colorado 80226, telephone number (303) 232-1456, for cross-examination.

d. Paul E. Emrick, Business Manager of Plumbers Local Union No. 3, and Chairman of the Board of Trustees of the Colorado Pipe Industry Pension Plan, 360 Acoma Street, Room 316, Denver, Colorado 80223, telephone number (303) 722-2333.

e. Dale M. Camblin, Business Manager of Pipefitters Local Union No. 208, 6350 Broadway, Denver, Colorado 80216, telephone number (303) 428-4380.

f. The Plaintiff reserve the right to add additional witnesses upon reasonable notice.

g. Thomas G. Pike, 117 South Quay, Denver, Colorado 80226, telephone number 237-1075; Frank Lansville, 12806 West 61st Place, Arvada, Colorado 80004, Michael Murphy, 6110 West 73rd, Arvada, Colorado 80003.

h. Any witnesses listed by another party.

i. Any witness for rebuttal or impeachment purposes.

3. The Plaintiffs will call the following *expert* witnesses at trial:

a. Miquel A. Padro, Enrolled Actuary No. 146, Vice President of the Martin E. Segal Company, 57 Post Street, Suite 900, San Francisco, California 94194, telephone number (415) 392-0930, who will testify as to the calculations of the Defendant's withdrawal liability.

B. Defendant's Witnesses.

1. The Defendant may call the the following witnesses at any trial of the asserted claims.

a. Any or all of the current Plaintiff Trustees, or those who served as Trustees as of May 29, 1986. The address of such Trustees is 1331 Tremont Place, Suite 201, Denver, Colorado 80204, telephone number (303) 595-4617.

b. Mr. James P. Hendricks, 1500 Merabank Tower, 3003 North Central Avenue, Phoenix, Arizona, 85012-2964.

c. Mr. Richard Arnold, corporate counsel, Howard Electrical and Mechanical, Inc., 6701 West Alameda Avenue, Lakewood, Colorado 80226, telephone number (303) 232-1456.

d. Mr. Timothy M. Bowman, Howard Supervisor/Project Manager, 6701 West Alameda Avenue, Lakewood, Colorado 80226, telephone number (303) 232-1456.

e. Any witness listed by Plaintiff.

f. Any witness for rebuttal for impeachment purposes.

2. The Defendant Howard may call the following *expert* witness at trial.

a. Mr. Ray Pinchkowsky, Milliman & Robertson, 370 Seventeenth Street, Suite 2250, Denver, Colorado 80202. Mr. Pinchkowsky may testify as an expert witness concerning such plan or Fund contributions, required calculations and withdrawal liability, as a rebuttal witness to Plaintiffs' expert, Mr. Padro. Further, Mr. Pinchkowsky may testify as an expert witness that plan information supplied by Plaintiffs in response to requests from Defendants' counsel is insufficient to verify

the amount of claimed contributions due, or the amount of claimed withdrawal liability due, even on the assumptions in Plaintiffs' Amended Complaint. Lastly, Mr. Pinchkowsky may testify as an expert witness that the amount of past contributions and withdrawal liability asserted by Plaintiffs cannot be assessed as of the date of the claim for such, but rather, only on a current basis, in compliance with the Pension Guarantee Corporation opinions and regulations adopted under ERISA.

C. Written summaries of opinions of expert witnesses and a description of expert's qualifications may be provided to opposing counsel no late than *thirty (30) days* after the entry of the Pre-Trial Order. The names of any additional witnesses may be disclosed to opposing counsel within ten (10) days of their becoming known or their existence should have become known. In addition, a final written list of witnesses must be filed at the Status Conference referred to in Section XIII(B).

VII. EXHIBITS

A. The Plaintiffs will offer any or all of the following exhibits at trial.

1. Collective Bargaining Contract, including the applicable Trust Agreement, effective May 1, 1981, through May 21, 1983.

2. Letter from the Colorado Pipe Benefit Trust Funds to Defendant dated May 29, 1986, and Exhibits I through IV attached thereto, initially notifying the Defendant of the amount of this withdrawal liability.

3. Letter from James P. Hendricks, Kaplan, Jacobwitz, Byrnes, Rosier & Hendricks, to the Board of Trustees of the Colorado Pipe Industry Pension Fund, dated July 17, 1986, requesting that the Trustees review their determination as to withdrawal liability.

4. Letter from James C. Fattor, Hornbein, MacDonald and Fattor, dated September 24, 1986, responding to James P. Hendricks' correspondence of July 17, 1986.

5. Letter from James P. Hendricks, Kaplan, Jacobwitz, Byrnes, Rosier & Hendricks, to Leon H. Land, Fund Administrator of the Plaintiffs, dated November 13, 1986, informing the Plaintiff that Defendant Howard has executive contracts with the unions as of November 5, 1986.

6. Letter from James C. Fattor, Hornbein, MacDonald and Fattor, to Howard Electrical & Mechanical, Inc., dated December 17, 1986, regarding its failure to make its first two quarterly withdrawal liability installment payments due on July 28, 1986, and on October 1, 1986.

7. Letter from Roland C. Herdine, Vice-President of Defendant Howard, to the Pipe Industry Trust Funds, dated March 12, 1987, inquiring about a $592.38 check to the Plaintiffs refunded to the Defendant.

8. Letter from James C. Fattor, Hornbein, MacDonald and Fattor, to Mr. Roland C. Herdine of Defendant Howard, dated March 26, 1987, notifying the Defendant that there is no contract with the unions and that it is illegal for the funds to accept contributions.

9. Decision of Administrative Law Judge, Jerrold H. Shapiro, of the National Labor Relations Board Branch Office in San Francisco, California, dated April 8, 1987, regarding Cases, 27-CA-8889, 27-CA-8889-2, and 27-CA-8924 of Howard Electrical and Mechanical, Inc. and Plumbers Local Union No. 3 and Pipefitters Local Union No. 208.

10. Payroll records of Defendant Howard for the period January 1985 to the present.

11. Defendant Howard's contract impasse offer of December 31, 1983.

12. Letter from Defendant Howard to the unions of June 18, 1984, and modified impasse offer.

13. Letter from Defendant Howard to the unions of August 15, 1984.

14. Any exhibits listed by any other party.

B. The Defendant may offer any of all the following exhibits at trial.

1. The Collective Bargaining Contract for the period May 1, 1981, through May 31, 1983, between Howard and Plumbers Local No. 3 and Pipefitters Local No. 208, including the applicable Trust Agreement.

2. Documents concerning the negotiation history between Howard and Plumbers Local No. 3 in the period March 1983 through January 1984, including the following documents:

a. Union request for negotiations, March 3, 1983;

b. Daily journal entry, April 17, 1983;

c. Union proposal, special helper category, March 9, 1983, June 2, 1983;

d. Howard's request in negotiations, March 11, 1983;

e. Howard's list of negotiators, March 22, 1983;

f. Minutes, collective bargaining sessions, first through sixth sessions;

g. Howard's bargaining proposals March 23, 1983, May 19, 1983, June 2, 1983, July 6, 1983, December 29, 1983, plus incidental correspondence.

3. Negotiation history – Pipefitters Local No. 208, March 1983 through January 1984, including:

a. Proposal for negotiations, May 3, 1983;

b. Howard letter requesting negotiations, individual basis, March 11, 1983;

c. Union's negotiation committee, March 23, 1983;

d. Howard's negotiators, March 22, 1983;

e. Minutes of all bargaining sessions, first through eleventh session;

f. Howard proposals in such negotiations, March 22, 1983, May 19, 1983, June 28, 1983, December 30, 1983, and incidental correspondence.

g. Union's proposed agreement (special journeymen), June 1, 1983.

h. Union proposal of April 15, 1983.

i. Howard telegrams to union, December 23, 1983, January 16, 1984;

j. Union's letter, December 30, 1983; telegram, January 11, 1984.

4. Negotiation history, Plumbers Local No. 3, 1984, including:

a. Howard proposal, June 19, 1984, union rejection dated June 27, 1984;

b. Howard's letter dated August 15, 1984, union's rejections letter dated August 16, 1984;

c. Howard, fund contribution records 1984, inclusive of all employees, as such records relate to collective bargaining negotiations in the period.

5. Negotiation history, Pipefitters Local No. 208, 1984, including:

a. Howard's letter dated June 19, 1984 and proposal;

b. Howard's letter to local, August 15, 1984;

c. Howard's letter to union, January 26, 1984;

d. Howard fund contribution records 1984, inclusive of all employees, as it may relate to 1986 bargaining negotiations.

e. Union correspondence relating to (a) through (c) above.

6. Joint negotiations, history, 1985, including:

a. Joint negotiation minutes of all sessions, first through sixth session;

b. Howard proposals, July 11, 1985, July 17, 1985, July 31, 1985, October 11, 1985;

c. Joint union proposal, March 22, 1985;

d. Union correspondence, August 7, 1985;

e. Howard's responses to union correspondence, August 27, 1985;

f. Hendricks' letter, September 10, 1985, threatening unfair labor practice charges;

g. Plumbers Local No. 3 response, September 18, 1985; and Pipefitters Local No. 208 response, September 20, 1985;

h. Howard's letter and proposals dated October 11, 1985 to Plumbers Local No. 3 and Pipefitters Local No. 208;

i. Hendricks' letter, October 2, 1985;

j. Correspondence relating to the above through December 1985;

k. Personnel records 0 Dockum – 1985.

7. Negotiation history, 1986, including:

a. Hendricks' letter, June 24, 1986;

b. Fund letter, May 29, 1986;

c. Fund letters October 8, 1984 and November 6, 1984;

d. Hendricks' letter to fund, July 17, 1986;

e. Fattor letter in response to Hendricks', September 24, 1986;

f. Howard's letter of November 5, 1986 accepting union's previous March 22, 1985 proposal in its entirety;

g. Union's November 12 and 13, 1986, letters (Plumbers Local No. 3 and Pipefitters Local No. 208 respectively) in response to Howard's letter of November 5, 1986;

h. Howard's November 26, 1986 letter;

i. Union's letter of December 2, 1986.

8. Negotiation, 1987, including:

a. Tendered contribution checks incident to November 1986 acceptance of union's contract proposal by Howard, three checks dated February 12, 1987;

b. Tendered fund forms in conjunction with contribution checks dated February 1987;

c. Fund separate checks returning contributions dated March 1987;

d. Fund correspondence to Howard through fund counsel dated March 12 and 13, 1987;

e. Herdine letter to Fund dated March 12, 1987 and Fattor response dated March 26, 1987;

f. Howard's March 30, 1987 telegram request to unions requesting craftsman to be supplied from hiring hall and unions response declining request;

g. Union's April 1, 1987 proposal;

h. Howard's responses to union proposals of April 1, 1987, dated April 28;

i. Union responses dated May 7, 1987;

j. Howard's response to union's letter of May 7, dated June 2, 1987;

k. Plumbers Local No. 3, negotiation proposal, September 16, 1987;

l. Agreement between the parties, dated October 27, 1987;

m. Howard's NLRB charges, case no. 27-C-2425 and (2).

9. Decision of NLRB Administrative Law Judge Shapiro, Case Nos. 27-CA-8889, 8889-2, 8924, April 1987, settlement agreements, NLRB, same charges, October 17, 1984.

10. Murphy, Lansville, NLRB Charge, 27-CA-9085, v. Howard; NLRB letter dismissing charge dated February 2, 1986; NLRB General Counsel, dismissal of appeal re charge, August 15, 1986.

VIII. DISCOVERY

Discovery has not yet been completed. The Plaintiffs will depose any expert of Defendant Howard following the receipt of a report from said witness.

The Defendant will depose certain Trustee(s) and Fund Administrator concerning assertion that they conducted some independent investigation relating to the

existence of the labor dispute under the Act, 29 U.S.C. § 1398(2) herein, prior to issuance of the Fund letter to Howard dated May 29, 1986.

IX. SPECIAL ISSUES

A. Several Motions of both the Plaintiffs and the Defendant are still pending.

B. A special issue is whether this proceeding is preempted or collaterally estopped by the current and pending NLRB proceedings between Howard, Pipefitters Local No. 208, Plumbers Local No. 3, and counsel for the General Counsel for the National Labor Relations Board. This includes the issues re termination of journeymen Murphy, Lansville and Pike, where the NLRB refused to issue a complaint on their NLRB charges of unlawful termination by Howard.

C. A special issue is whether Defendant Howard is bound by the asserted determination of the Plaintiffs as to the amount of alleged withdrawal liability, for not arbitrating same, and whether there is any statutory duty to arbitrate such issues involving the labor dispute statutory exemption, 29 U.S.C. § 1398(2), and claims of preemption under the National Labor Relations Act.

X. OFFER OF JUDGMENT

Counsel acknowledge familiarity with the provisions of Rule 68 of the Federal Rules of Civil Procedure (Offer of Judgment) and have discussed with the clients against whom claims are made in this case.

XI. EFFECT OF PRE-TRIAL ORDER

A. Counsel acknowledge familiarity with the provisions of Rule 16 of the Federal Rules of Civil Procedure (Pre-trial Procedures; Formulating Issues).

B. Hereafter, this Order will control the subsequent course of this action, and the trail [sic] may not be amended except by consent of the parties and approval by the Court or by Order of the Court to prevent manifest injustice. The pleadings will be deemed merged herein. In the event of ambiguity in any provision of this Order, reference may be made to the records of the Pre-Trial Conference to the extent reported by stenographic notes and to the pleadings.

XII. AMENDMENTS TO THE PLEADINGS

A. To the extent it is not contained within the Sixth Defense of Howard, in answer to the Amended Complaint, Howard moves to add a Seventh Defense that the First and Second Claims for Relief in the Amended Complaint fail to confer subject matter jurisdiction upon this Court, since such claims are preempted by the exclusive and primary jurisdiction of the National Labor Relations Board under the National Labor Relations Act, as amended, 29 U.S.C. §§ 141, *et seq.*, and particularly section 158(a)(5) thereof.

XIII. TRIAL AND ESTIMATED TRIAL TIME; STATUS CONFERENCE

A. Trial is to this Court, and the estimated trial time is three (3) days.

B. A status conference will be held by the Court no later than thirty (30) days before the trial date. At this Status Conference, counsel are directed to file a final list of all exhibits and witnesses. The Court may also consider motions in limine, if any, on particular issues and other maters [sic] to expedite the trial.

DATED this 15th day of April, 1988.

Respectfully submitted,

HORNBEIN, MCDONALD & FATTOR, P.C.

By /s/ Jim Fattor
James C. Fattor, Esq.
1600 Broadway,
Suite 1900
Denver, Colorado 80202
(303) 861-7070

Attorneys for Plaintiffs

BRADLEY, CAMPBELL & CARNEY
Professional Corporation

By /s/ Victor F. Boog
#2561 for Earl K. Madsen
Earl K. Madsen, Esq.
1717 Washington Avenue
Golden, Colorado 80401
(303) 278-3300

Attorneys for
Howard Electrical &
Mechanical, Inc.

The above and within Pretrial Order is entered and dated in Denver, Colorado this 18th day of April, 1988.

BY THE COURT

/s/ Richard B. Harvey
RICHARD B. HARVEY
United States Magistrate

PIPE INDUSTRY BENEFIT TRUST FUNDS

(SEAL) 1313 Tremont Pl., Suite 201 (SEAL)

Denver, Colorado 80204

Telephone (303) 595-4617

May 29, 1986

Howard Electric & Mechanical Company
P.O. Box 26800
Lakewood, Colorado 80226

Gentlemen:

Our records indicate that you have not contributed to the Colorado Pipe Industry Pension Fund ("Plan") since December 31, 1984. We are further advised that negotiations for a new collective bargaining agreement have reached impasse.

Based upon this information, we conclude that you have withdrawn from the Plan. Accordingly, you are subject to the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980, a federal enactment amending the Employee Retirement Income Security Act of 1974 ("ERISA").

Pursuant to the provisions of this 1980 Statute and the implementing regulations promulgated by the Pension Benefit Guaranty Corporation, the Board of Trustees of the Plan have adopted certain methods of calculating the withdrawal liabilities applicable to participating employers who withdraw. These calculations are summarized on the attached forms. They indicate that your withdrawal liability amounts to $555,852.00. Demand is hereby made for payment of all such liability in accordance with the following schedule.

You may pay the withdrawal liability set forth in the preceding paragraph by a single lump sum payment within 60 days after your receipt of this letter.

Should you choose not to pay in a lump sum, the Act requires that the Trustees establish your schedule of payments based on the average annual hours of contributions for the three consecutive years of highest number of hours for which contributions were required during the previous ten years, multiplied by the highest amount per hour contribution made by you prior to your withdrawal. The result is an annual payment of $255,030.00 payable in quarterly installments of $63,758.00. Your first payment is due on July 28, 1986. Future payments are due on the first day of each quarter for the next nine (9) quarters. The final payment is for $46,814.00.

Should you fail to make your first monthly payment by its due date, or should you fail to make any subsequent monthly payments when due, ERISA, as amended, provides that you will incur interest charges from the date your payment becomes due until the date payment is finally received. Additionally, you may incur liability for liquidated damages and other sums assessed under the delinquency provisions of the Plan's Trust Agreement, and your obligation may be subject to such additional steps as the Trustees may require in accordance with the law.

More importantly, should you fail to pay any payment, plus interest, within 60 days after receiving written notice from the Plan that such payment is delinquent, or should you commit any other act which the Plan deems to constitute a "default" in your payment obligations, ERISA, as

amended, provides that the Board of Trustees may hold you liable for immediate payment of the entire outstanding amount of your withdrawal liability, including any interest which may be assessed on that total amount, from the due date of the first payment which was not timely made. It the Plan has to sue to collect such withdrawal liability, the Act requires the Court to award to the Plan its costs, attorney's fees, interest and liquidated damages.

Within 90 days from the date you receive this notice, you may:

(1) Request the Trustees to review any specific matter relating to the determination of your company's liability and payment schedule;

(2) Identify to the Trustees any claimed inaccuracy; and

(3) Furnish the Trustees with any additional relevant information.

The Plan will review any matter raised by you, and you will subsequently be notified of the Plan's decision, the basis for the decision and the reason for any change in the determination of your liability or your liability payment schedule. *You are required by the Act to make the payments set forth in this letter on a timely basis, notwithstanding any request for review of appeal of the determination of the amount of your liability payment schedule.* Any adjustments to your liability will be reflected in your future payments.

This letter is intended to provide you with notice of your liability and payment obligations under ERISA, as

amended. It is not intended as an explanation of the Statute, nor should it be construed as limiting in any way the rights of the Plan under the Statute.

Sincerely,

THE BOARD OF TRUSTEES,
COLORADO PIPE INDUSTRY PENSION FUND
/s/ L. H. Land
Leon H. Land
Fund Administrator

Enclosure

copy to: All Trustees
Hornbein, MacDonald, & Fattor, P.C.
Martin E. Segal Company

LHL:um
opeiu #5
afl/cio

LAW OFFICES

KAPLAN, JACOBOWITZ, BYRNES,
ROSIER & HENDRICKS
A PROFESSIONAL ASSOCIATION

July 17, 1986

Marvin R. Kaplan [1936-1980]
Jarril F. Kaplan
Henry Jacobowitz
Robert F. Byrnes
Paul Rosier
James P. Hendricks
Richard G. Himelrick
M. David Shapiro

1500 Merabank Tower
3003 North Central Avenue
Phoenix, Arizona 85012-2964
[602] 264-3134

6991 East Camelback Road
Suite A-302
Scottsdale, Arizona 85231
[602] 945-0774

Please Reply to Phoenix Office

CERTIFIED – RETURN
RECEIPT REQUESTED

Board of Trustees
Colorado Pipe Industry Pension Fund
1313 Tremont Place
Suite 201
Denver, Colorado 80204

Re: Howard Electric & Mechanical Company

Gentlemen:

On behalf of our client, Howard Electric & Mechanical Company (the "Company"), we are responding to your letter dated May 28, 1986, determining that the Company has withdrawn from the Colorado Pipe Industry Pension Fund (the "Plan") and demanding payment of withdrawal liability in the amount of $555,852.00. The Company does not agree with the Trustees' determination that it has withdrawn from the Plan and that it owes

$555,352.00 in withdrawal liability. Pursuant to Section 4219(b)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multi-Employer Pension Plan Amendments Act of 1980, the Company requests that the Trustees review their determination that the Company has withdrawn from the Plan effective April 31, 1984, and their calculation of withdrawal liability.

Under Section 4203 of ERISA, an employer will not be deemed to have withdrawn from a plan until it ceases to *have an obligation* to contribute under the plan and continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required.

The Trustees based their determination that the Company has withdrawn from the Plan on an alleged failure to contribute to the Plan since December 31, 1984, and on an alleged impasse in collective bargaining negotiations between the Company and Journeymen Plumbers and Gas Fitters Local Union No. 3 and Pipefitters Local Union No. 208 (the "Unions").

As you know, the Company has been involved in collective bargaining negotiations with the Unions since 1983. The Company has continued to be obligated to make, and indeed has made, contributions to the Plan on behalf of its eligible employees during its negotiations with the Unions; contributions which, we note, the Trustees did not take into account in calculating the Company's withdrawal liability. Notwithstanding the Company's right to suspend contributions to the Plan during

its labor dispute with the Unions, the Company has continued to make contributions to the Plan to December 28, 1984. The Company's *obligation* to contribute to the Plan on behalf of its eligible employees remains unaffected by its collective bargaining negotiations.

Furthermore, the Company does not agree that negotiations are at an impasse; that is solely the position of the Unions. If the Trustees had conducted an independent inquiry into the facts instead of imposing withdrawal liability on the Company on the basis of the Unions' unsubstantiated statement that negotiations were at an impasse, they would have discovered that negotiations are not at an impasse as evidenced by the facts that the Company and the Unions met for negotiations as recently as August 1985, that the Company made an additional offer in writing to the Unions in October 1985, which offer has not yet been responded to by the Unions, and that the Company is willing to meet with the Unions to continue negotiations culminating in a new collective bargaining agreement. The Trustees appear to be acting as agents of the Unions in this case. The Trustees are under a fiduciary obligation to act solely on behalf of Plan participants and their beneficiaries. In accordance with their fiduciary duties, the Trustees are under an obligation to make a reasonable inquiry regarding the facts prior to assessing withdrawal liability on the Company. Failure to do so may constitute a violation of their fiduciary duties under ERISA. See T.I.M.E.-*DC, Inc. v. Trucking Employees Fund*, 560 F.Supp. 294, 303 (E.D. N.Y. 1983).

Under Section 4218(2) of ERISA, an employer is not deemed to have withdrawn from a plan during a labor

dispute involving its employees. The Company is clearly involved in an ongoing labor dispute with its employees. Until that dispute is finally resolved one way or the other, the Company cannot be deemed to have withdrawn from the Plan. As you may know, the Company and the Unions are involved in proceedings before the National Labor Relations Board. In view of the Board's expertise in this area, we suggest that the Trustees defer any determination until the Board acts.

The Company also disagrees with the Trustees' selection of April 30, 1984, as the date of withdrawal and their calculation of its withdrawal liability. The withdrawal date used by the Trustees for purposes of calculating withdrawal liability assumes that the Company withdrew from the Plan on April 30, 1984. That date disregards the fact that the Company engaged in collective bargaining negotiations with the Unions throughout 1985 and continued to contribute to the Plan under the terms of its prior agreement. Even if the Unions were correct that the parties are at an impasse, the earliest date on which the Company could have been deemed to have withdrawn from the Plan would be August 1985. We respectfully request that, if the Trustees intend to impose withdrawal liability on the Company, such liability be calculated as of August 1985, when the Company and Unions last met for negotiations, and not April 30, 1984.

Furthermore, we respectfully demand that any calculation of withdrawal liability include contributions made to the Plan by the Company in 1984. The Company has continued to make, and the Trustees have continued to accept, contributions to the Plan for eligible employees. The Trustees are without authority to disregard those

contributions in calculating withdrawal liability. We also request clarification as to what contributions are included in the figures used by the Trustees. We cannot reconcile the figures used by the Trustees with the Company's contribution records. We request a breakdown of its contributions between the amounts contributed on behalf of members of the Local Union No. 3 and amounts contributed on behalf of the Local Union No. 208 in order to determine the accuracy of those figures.

We respectfully request that you respond to our request for review within a reasonable period as specified in Section 4219(b)(2)(B) of ERISA.

Very truly yours,

/s/ James P. Hendricks
James P. Hendricks

JPH:kk

cc: Jack Howard
R. C. Herdine
Ann Leary
Earl Madsen

Hornbein, MacDonald and Fattor
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
1900 Colorado State Bank Building
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Philip Hornbein (1962)
Philip Hornbein, Jr.
Donald P. MacDonald
James C. Fattor
Mark E. Brennan
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Area Code 303
861-7070

Of Counsel
Charles M. Dosh

September 24, 1986

James P. Hendricks, Esq.
Kaplan, Jacobowitz, Byrnes, Rosier and Hendricks
1500 Merabank Tower
3003 North Central Avenue
Phoenix, Arizona 85012-2964

re: Colorado Pipe Industry Pension Fund vs. Howard Electrical and Mechanical, Inc.

Dear Mr. Hendricks:

This letter is the Trustees' response pursuant to Section 4219(b)(2)(B) of ERISA to your request for review of their prior determination of the withdrawal liability of your client Howard Electrical and Mechanical, Inc. The Trustees' investigation discloses the following:

1. Howard has not been a party to any collective bargaining agreement with any local union affiliated with the Colorado Pipe Industry Pension Fund since May 31, 1983.

2. On January 26, 1984, Howard declared bargaining to be at an impasse and on or about August 15, 1984, Howard unilaterally implemented changes in wages, fringe benefits and working conditions which

included the cessation of any payments of pension benefits.

3. Pipefitters Local Union 208 filed a charge with the National Labor Relations Board on or about September 25, 1984, in response to which Howard executed a settlement agreement. Pursuant to the settlement agreement, Howard paid arrearages to the Colorado Pipe Industry Pension Fund for pension contributions through November of 1984, and has paid pension benefits for two of its employees performing covered work through December 31, 1984.

4. On October 10, 1984, the Pipe Industry Pension Fund determined that Howard Mechanical owed the sum of $559,564.00 in withdrawal liability and made a demand therefor. Its demand was withdrawn on account of Howard's settlement agreement.

5. On or about December 31, 1984, Howard terminated the last two union employees it had, and since that date has not employed any active union plumber or pipefitter affiliated with any local union that is a part of the Colorado Pipe Industry Pension Fund.

6. Howard has not made any pension contributions for covered work since December 31, 1984. There have been no negotiations between Pipefitters Local 208 or Plumbers Local 3 and Howard since August 7, 1985, at which time the Unions declared negotiations to be at an impasse.

7. The Company made no demand to bargain until June 24, 1986, four weeks after the Pipe Industry Pension Fund notified Howard Electric of its determination of the withdrawal liability.

8. The National Labor Relations Board has rescinded the settlement agreement and issued a complaint in Case Nos. 27-CA-8889 and 8889-2, which alleged among other things that Howard has failed to bargain in good faith, and has unilaterally altered wages and benefits for employees represented by Local 3. The

> Company has denied that its employees are represented by Local 3 and has denied it has unilaterally altered wages and benefits, notwithstanding its failure to pay any pension benefits since December 31, 1984.

In view of the foregoing, the Trustees affirm their determination of May 26, 1986, that Howard has, in fact, permanently withdrawn from the Pension Plan as of December 31, 1984. For the purposes of determining the amount of that liability, Section 4211 of ERISA requires that unfunded liability be determined as of the end of the plan year preceding the plan year in which the employer withdraws. That plan year ended April 30, 1984, and therefore the amount determined as due is correct.

If you continue to dispute this determination, you have a right to demand arbitration pursuant to Section 4221 of ERISA within sixty (60) days of the date of this letter. The American Arbitration Association has adopted rules for determination such liability pursuant to the Rules of the PBGC.

Even if you choose to arbitrate this, you have an obligation, pursuant to the provisions of Section 4221 of ERISA, to make payments pursuant to the Trustees' determination, and if you fail to make these payments as due, you shall be deemed delinquent. Interest at the statutory rate will be charged with respect to any delinquency. Furthermore, we are instructed to initiate an action to collect any such delinquencies and to seek all other remedies available, including attorney's fees.

Very truly yours

HORNBEIN, MacDONALD, AND FATTOR, P.C.

/s/ James C. Fattor
James C. Fattor

JCF:paf

Copy to: Trustees, Colorado Pipe Industry Pension Plan

> 30-RC-710 dated July 29, 1952, for all journeymen plumbers and gas fitters, apprentice plumbers and gas fitters, area plumber foremen, general plumber foremen, plumber foremen, journeymen pipefitters, apprentice pipefitters, area pipefitter foremen, general pipefitter foremen, pipefitter foremen who are employed by any Employer who is a party to this Agreement or has accepted its provisions.

Prior to the expiration date of the 1981-1983 contract the Charging Parties and Respondent gave timely notice they intended to open the about to expire contract and engage in collective bargaining for a new contract. Respondent also gave timely notice to the Charging Parties it was withdrawing the Association's authority to represent it for purposes of collective bargaining and it intended to negotiate with the Charging Parties on an individual basis.

2. The March 23, 1983-December 29, 1983 negotiations between Respondent and Local 3 and the December 22, 1983-January 6, 1984 negotiations between Respondent and Local 208

Commencing March 23, 1983 negotiators for Respondent and Local 3 met to negotiate a collective bargaining contract to succeed the 1981-1983 contract to cover Respondent's employees represented by Local 3. During 1983 the parties held six collective bargaining sessions: March 23; April 27; May 19; May 31; July 16; and, December 29. During this period Respondent offered a series of proposed contracts which modified the 1981-1983 contract in many significant respects. There was no evidence of Local 3 offering a proposed contract.

As of the July 6, 1983 bargaining session Respondent was proposing a contract effective from the date of its execution to May 31, 1984. Some of its relevant provisions follow.

The "recognition" clause provides for Respondent to recognize Local 3 as the representative "of all full-time and regular part-time employees employed by [Respondent] performing plumbing work in the plumbing industry within the jurisdiction of Local 3." The "hiring of employees" provision gives Local 3 the opportunity to refer all journeymen and apprentice applicants for employment, with Respondent having the right to reject any of the referrals and to hire from other sources if Local 3 failed to fill Respondent's request for applicants after a certain period of time, and further provides that "helpers will not be selected or referred out by Local The wage provision gives Respondent the power to unilaterally increase the employees' minimum hourly rates of pay, and to establish minimum "gross hourly rates" for three classifications: "journeymen," "apprentices," and "helpers." The minimum "gross hourly rates" include Respondent's contributions on behalf of the employees to the several contract benefit funds such as health and welfare, pension, and vacations.[4]

Effective June 1, 1983 the minimum gross hourly rate of pay set for journeymen plumbers by the July 6

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[4] The health and welfare, pension and vacation benefit provisions in the July 6, 1983 contract offer obligate Respondent to deduct from the employees' "gross hourly rate of pay" the amounts agreed to by Local 3 and Respondent for distribution to the several contract employee benefit funds.

proposal was $21.20 and $8.55 for apprentices just starting their apprenticeship.[5] Effective December 31, 1983 the minimum gross hourly rate of pay for journeymen plumbers was $21.70 and $8.72 for apprentices just starting their apprenticeship. Effective June 1, 1983 the minimum gross hourly rate of pay for employees classified as helpers was $5.44. Regarding the helpers, the wage proposal provides that "the ratio of helpers shall be two helpers to each plumber, and there shall be no restriction on the work assignments designated by the Employer."

The aforesaid wage and fringe benefit package for journeymen and apprentices contained in Respondent's July 6, 1983 contract proposal which was effective June 1, 1983, is the same as the wage and benefit package called for under the terms of the 1981-1983 contract when it expired May 31, 1983.[6]

During the July 6, 1983 bargaining session Local 3's negotiators wrote a letter prepared by their attorney which was critical of virtually all of the provisions contained in Respondent's July 6, 1983 contract proposal.[7] It

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[5] Under the terms of the 1981-1983 contract and under the terms of each of the contract proposals involved in this case, apprentices are paid a certain percentage of the contract hourly rate of pay for journeymen, which percentage is increased every 6 months during the apprentices' employment, until they finish their term of apprenticeship.

[6] The 1981-1983 contract, however, did not have a "helper" classification, just "journeymen" and "apprentice" classifications.

[7] The criticism did not extend to the wage and fringe benefit proposals because Local 3 apparently did not submit those parts of the proposal to its attorney for review.

was at the July 6 session that Respondent submitted a new bargaining proposal, the above-described July 6 contract proposal, which in all significant respects was no different from the May 31 contract proposal. The July 6 session ended with the parties agreeing to hold another bargaining session after Local 3 reviewed Respondent's July 6 contract proposal. It was not until December 29, 1983, however, that the next bargaining session was held. It was called by Respondent.

On December 29, 1983, during the bargaining session held that day, Respondent submitted a new contract proposal. Respondent's negotiators characterized this proposal as Respondent's "final offer" and told Local 3's negotiators Respondent "intended to implement its final offer effective January 1, 1984."

The next time the parties communicated with one another concerning contract negotiations was June 19, 1984 when, as described in detail *infra*, Respondent submitted a new contract proposal to Local 3.

Commencing on March 22, 1983 negotiators for Respondent and Local 208 met to negotiate a collective bargaining contract to succeed the 1981-1983 contract to cover Respondent's employees represented by Local 208. During 1983 the parties held 10 collective bargaining sessions: March 22; April 15; April 27; May 19; June 1; June 28; July 20; September 16; November 17 and December 30.

During the first bargaining session held on March 22, 1983, Respondent submitted a proposed collective bargaining contract to succeed the 1981-1983 contract. This proposal contained many provisions which in significant

respects differed from the 1981-1983 contract's provisions. The proposal was effective from date of execution to May 31, 1984. The provisions of the March 22, 1983 contract proposal dealing with recognition, hiring of employees, wages and benefits, in pertinent in part, read as follows.

Respondent proposed in the contract recognition clause to recognize Local 208 as the collective bargaining representative of "all full time and regular part-time employees employed by the Employer performing pipefitting work in the pipefitting industry." The "hiring of employees" provision gave Local 208 the opportunity to refer "all covered employees," with Respondent having the unqualified right to reject any referrals, and the right to hire from other sources if, after a certain period of time, Local 208 did not fill Respondent's request for applicants, and further provides that "apprentices, trainees and helpers will not be selected or referred out by Local 208. The Employer will make selections and these names . . . will be transmitted to Local Union No. 208." The wage provisions of the proposal establish minimum wages for the covered employees, granting Respondent the authority to unilaterally increase those minimum wages and grant incentive increases based upon employees' productivity and performance, and sets out 84 classifications for pipefitters (classifications "16" through "100") whose minimum hourly rates of pay range from $4 (classification "16") to $25 (classification "100"), and further provides Respondent could unilaterally designate which of the 84 classifications the pipefitters would be assigned to. The proposed benefit provision provided for Respondent to deduct from

employees' earnings an amount agreed to by the parties for distribution to the employee contract benefit funds such as health and welfare, pension and vacation.

During the period of negotiations from March 22, 1983 to November 17, 1983 the parties discussed in detail Respondent's March 22, 1983 contract proposal. It was apparently revised by Respondent more than once, in ways not revealed in the record, during this series of negotiation sessions. Local 208 did not counter with a contract proposal of its own and on at least one or two occasions Local 208's membership rejected Respondent's contract proposals. This was the state of the negotiations when the parties met December 30 for the tenth negotiation session.

On December 30, during the negotiation session, Respondent submitted a new contract offer which it characterized as "its last offer." Local 208's negotiators told Respondent's negotiators that the offer would be submitted to the Union's membership.

On January 3, 1984, Local 208 notified Respondent "that the negotiation committee of pipefitters Local Union 208 has not approved or accepted [Respondent's] latest contract proposal but will submit the proposal to [Local 208's] membership for their consideration at a meeting on January 10, 1984." Thereafter, on January 11, 1984 Local 208 notified Respondent that its membership unanimously rejected Respondent's latest contract proposal at a January 10, 1984 special meeting, and that Local 208 was "willing to continue negotiations at your earliest convenience." Respondent replied by telegram dated January 16, 1984, in which it stated:

> Please be informed that the understanding that we reached at the table on December 30, 1983 was our last offer. We are willing to meet with you if you submit to us in writing a proposal that is substantially better than the proposal we agreed upon at the table. Absence (sic) our receiving a new written proposal from you by January 22, 1984 we will implement the understanding reached at the table on January 23, 1984.

On January 20, 1984 Local 208 hand-delivered a contract proposal to Respondent. There were no collective bargaining sessions held between the parties concerning Local 208's proposal. There is no evidence the parties discussed this proposal.

On January 26, 1984, by letter, Respondent informed Local 208 it had reviewed Local 208's January 20, 1984 contract proposal and discovered it did not contain a single concession and that there were numerous changes made in the agreement reached by the parties on December 30, including a significant economic increase.[8] The letter ended:

> In the light of the above, we see no reason to resume negotiations. Since our last offer was rejected by the membership, we are, of course, at impasse and will implement our last offer.

The next time the parties communicated with one another concerning contract negotiations was June 19,

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[8] There is no evidence of an "understanding" or "agreement" between Local 208 and Respondent during the December 30, 1983 negotiation session as claimed by Respondent in its above-described January 16, 1984 telegram and January 26, 1984 letter.

1984, when, as described in detail *infra*, Respondent submitted a new contract proposal to Local 208.

Respondent's December 29, 1983 contract proposal and Respondent's December 30, 1983 contract proposal.

The duration of Respondent's December 29, 1983 contract proposal for the unit represented by Local 3 and the duration of its December 30, 1983 contract proposal for the unit represented by Local 208 was from the date of their execution until May 31, 1984. Each proposal is identical in all significant respects. The proposals, which for the sake of convenience will be collectively referred to as Respondent's December 1983 contract proposal differ in several significant respects from Respondent's last contract proposals; its March 22, 1983 proposal for the unit represented by Local 208 and its July 6, 1983 proposal for the unit represented by Local 3.

The contract recognition clause in Respondent's previous contract proposals included within the contract bargaining unit all employees who performed plumbing work in the plumbing industry within Local 3's jurisdiction and all employees who perform pipefitting work in the pipefitting industry within Local 208's jurisdiction, whereas the December 1983 contract proposal's recognition clause specifically excludes plumbers and pipefitters classified as "pre-apprentices" from the bargaining unit. Consistent with the exclusion of "pre-apprentices" from the unit in the contract recognition provision, the union security and hiring hall provisions of the December 1983 contract proposal also specifically exclude "pre-apprentices" from their coverage. The December 1983 contract proposal describes the plumbers and pipefitters classified as "pre-apprentices" in these terms:

> Pre-apprentices shall be primarily used for performing work which does not require all the skills of a journeyman. However, pre-apprentices may be assigned to perform work for which they are qualified, under the direction of a journeyman. The ratio of pre-apprentices shall be at the direction of the employer. There shall be no restriction on the work assignments designated by the employer.

The December 1983 contract proposal, unlike respondent's previous contract proposals, divides the employees into two separate categories for purposes of wages and employee benefits; current employees, new hires and recalled employees.

The December 1983 contract proposal's wage and benefit package[9] for the pipefitters and plumbers classified as journeymen and apprentices, who were currently employed, was less than had been provided for under the wage and benefit package in Respondent's March 22, 1983 and July 6, 1983 contract proposals and was less than what was being paid to the Respondent's journeymen and apprentice pipefitters and plumbers under the terms of the 1981-1983 contract.

Regarding new hires or recalled employees classified as journeymen and apprentices, the December 1983 contract proposal provides for the same amount of employee benefit contributions as for current employees employed in those classifications, but provides for an hourly rate of

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[9] As did Respondent's March 22, 1983 and July 6, 1983 contract proposals, the December 1983 contract proposal gave Respondent the right to unilaterally raise the employees' contract minimum hourly rates of pay.

pay of $10 for journeymen, which is substantially less than the rate called for in the 1981-1983 contract for journeymen and at least $6.71 an hour less than the hourly rate called for in Respondent's March 22, 1983 and July 6, 1983 contract proposals for journeymen. Since apprentices are paid a percentage of a journeyman's hourly rate of pay, the hourly rate for newly hired or recalled apprentices in the December 1983 contract proposal was reduced by the same percentage as the journeymen's.

Regarding the new classification of employees designated as "pre-apprentices," the December 1983 contract proposal provides that plumbers and pipefitters employed in this classification be paid a minimum hourly rate of $5 if currently employed and a minimum hourly rate of $4 if they are new hires or recalled workers. It also provides that, unlike the journeymen and apprentices, the pre-apprentices are ineligible to receive the contract fringe benefits, but are eligible to participate in Respondent's profit-sharing and major medical insurance plans.

Lastly, the December 1983 contract proposal contains a "nonseverability" provision which in substance provides that the parties understood that the December 1983 contract proposal is called a package agreement and that no provision is severable . . . that is each provision herein is in consideration for the entire Agreement and to benefit from any provision a party must assume the benefits and obligations of the entire Agreement."

Local 208's January 20, 1984 contract proposal

Local 208's January 20, 1984 contract proposal is effective by its terms from the date of execution until May

31, 1985, rather than May 31, 1984 as provided for by Respondent's December 1983 contract proposal.

The recognition clause in Local 208's proposal includes all employees who performed pipefitting work in the pipefitting industry within the jurisdiction of Local 208.

Respondent's contributions on behalf of the journeymen and apprentices to the several contract benefit funds were the same through May 31, 1984 under Local 208's proposal as under Respondent's proposal, but effective June 1, 1984 Local 208's proposal calls for an increase of $1.50 an hour to be divided among wages and fringes.

Regarding wages, Local 208's proposal does not, as did Respondent's, divide the journeymen and apprentices into presently employed employees and new hires. Local 208 proposed that journeymen and apprentices be paid $1.30 an hour more than Respondent had proposed and also proposed that effective June 1, 1984 they be granted an increase of $1.50 an hour to be broken down between wages and fringes.

In its January 20, 1984 proposal Local 208 also included an agreement dealing with the creation of a new classification of workers, known as "special journeyman." This agreement provided:

> Special journeyman shall be primarily used for performing work which does not require all of the skills of a journeyman. However the special journeyman may be assigned to perform any work for which he is qualified, under the direction of a journeyman.

> The ratio of special journeyman shall be two special journeymen to each journeyman pipefitter; not to exceed 30 percent of the total pipefitters employed by [Respondent].
>
> Special journeyman shall only be employed on those contracts that the total of plumbing, heating, air conditioning and piping contracts does not exceed two and one-half million dollars. . . .

Local 208 proposed that the "special journeyman" be paid an hourly rate of pay ranging from a minimum of $5.03 to a maximum of $10.06. It also proposed that Respondent contribute on their behalf to the contract health insurance fund as they did for the journeymen and apprentices, but would not have to contribute on behalf of the "special journeymen" to the other contract benefit funds. Also, Local 208 proposed that the above agreement concerning the "special journeyman" remain in effect for 6 months from the date of execution and from year-to-year thereafter unless terminated by both parties.

3. The implementation of Respondent's December 29 and December 30, 1983 contract proposals and Respondent's employment of "pre-apprentices."

As I have found *supra*, during the December 29, 1983 negotiations session, Respondent informed Local 3 it "intended to implement its final offer [the December 29 proposal] effective January 1, 1984," and on January 26, 1984 informed Local 208 "We are . . . at impasse and will implement our last offer [the December 30 proposal]." The evidence presented on the issue of whether or not Respondent implemented either of these contract offers, follows.

Respondent did not implement the terms of its December 1983 contract proposal in two respects: the payments made by Respondent on behalf of its journeymen plumbers and pipefitters to the several contract benefit funds were mailed directly to the Pipe Industry Insurance Fund (Fund), whereas the December 1983 contract proposal provided the payments be mailed directly to the offices of Local 3 and Local 208 which would transmit them to the Fund; and, the December 1983 contract proposal omits Respondent's contribution to the Contract Administration Fund, whereas Respondent continued to pay contributions of 12 cents an hour to this fund as agreed upon under the 1981-1983 contract.

In hiring plumbers and pipefitters Respondent did not use the unions' hiring halls. It was not required, however, under the December 1983 contract proposal to give the unions an opportunity to refer these job applicants inasmuch as all of the plumbers and pipefitters hired by Respondent were classified as "pre-apprentices," all of whom were exempt from the hiring hall provisions of the December 1983 contract proposal. Likewise, the "pre-apprentices" were specifically excluded from the December 1983 contract proposal's union security provision, thus Respondent's failure to enforce the union security provision as to those workers was not inconsistent with the terms of the proposal and, in any event, the unions never requested Respondent to enforce the union security provision. Finally, the fact the Respondent continued to permit the journeymen in its employ to take the two 10-minute break periods provided for under the terms of the 1981-1983 contract, does not conflict with the

terms of the Respondent's December 1983 contract proposal inasmuch as there is nothing in that proposal which precluded its employees from taking two 10-minute breaks, in addition to their lunch break.

The sole evidence showing Respondent implemented the December 1983 contract proposal is that pursuant to the terms of that proposal Respondent employed plumbers and pipefitters who were classified as "pre-apprentices." As a matter of fact all of the plumbers and pipefitters hired by Respondent subsequent to January 1, 1984 were classified by Respondent as "pre-apprentices." The first plumber "pre-apprentice" was hired May 17, 1984 and the first pipefitter "pre-apprentice" was hired April 30, 1984. Between May 17, 1984 and October 7, 1985 Respondent hired 41 plumbers all of whom it classified as "pre-apprentices" and between April 30, 1984 and October 25, 1985 hired 24 pipefitters all of whom it classified as "pre-apprentices."[10] Consistent with its December 1983 contract proposal Respondent did not contribute to the contract benefit funds on behalf of the pre-apprentices and did not pay any of them less than the proposed $4 minimum hourly rate of pay for this classification. The

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[10] Following its hire of a plumber "pre-apprentice" on May 17, 1984, Respondent hired three in June 1984, three in July, two in September, two in October, two in November, two in December, three in January 1985, three in February, five in March, three in April, two in June, one in July, eight in August and one in October. Following its hire of a pipefitter pre-apprentice on April 30, 1984, Respondent hired one in May 1984, two in June, one in July, three in August, six in September, two in October, one in December, two in April 1985, one in August 1985, one in September 1985 and three in October 1985.

record reveals that the hourly rates paid to the 41 plumber pre-apprentices range from a minimum of $4 an hour paid to one and a high of $18 an hour paid to one, with the minority at the low end of the scale and the majority towards the middle. Regarding the 24 pre-apprentice pipefitters, their hourly rates of pay range from a minimum of $8 paid to three and a high of $17 paid to one, with the rest of the pre-apprentices being paid between $10 and $15 an hour.

4. The events of June 1984 - August 1984

Following Respondent's communication to Local 3 and Local 208 on December 29, 1983 and January 26, 1984, respectively, stating it intended to implement the December 1983 contract proposal, there was no further communication between the parties until June 20, 1984, when Local 3 and Local 208 received copies of a proposed contract from Respondent with an accompanying letter dated June 19, 1984, stating:

> Please find enclosed a package for your approval, which must be accepted in total, prior to July 1, 1984.
>
> We are prepared to discuss this enclosure with you at your request. This proposal will be implemented in its entirety July 1, 1984.

On June 27, 1984 and July 3, 1984, respectively, Local 3 and Local 208 each wrote Respondent it had reviewed and rejected the June 19, 1984 contract proposal and informed Respondent they wanted to meet with Respondent to discuss the terms of a new contract.

On or about July 1, 1984 Respondent declared an impasse and implemented its June 19, 1984 contract proposal. Local 3 and Respondent did not have any negotiations about Respondent's June 19, 1984 contract proposal prior to its implementation.

No meetings were held between Local 208 and Respondent concerning the June 19, 1984 contract proposal. The parties did not stipulate whether or not Respondent in fact implemented this proposal in the unit represented by Local 208. It is a fair inference, however, that Respondent implemented the proposal in that unit, inasmuch as the parties stipulated that it implemented the proposal in the unit represented by Local 3. Also in its August 15, 1984 letter to Local 208, *infra*, Respondent by telling Local 208, "If you do not accept this change in our implemented proposal [referring to the June 19, 1984 contract proposal]," in effect admitted it had implemented the June 19, 1984 contract proposal in the unit represented by Local 208.

Respondent's June 19, 1984 contract proposals made to Local 3 and Local 208 were identical in substance and will be referred to hereinafter as Respondent's June 1984 contract proposal. It was effective from the date of execution until May 31, 1985. The proposal differs from Respondent's December 1983 contract proposal in a number of significant respects, as follows.

Besides excluding "pre-apprentices," as did the December 1983 contract proposal, the June 1984 contract proposal's recognition provision excludes "apprentices" from the bargaining unit. The "hiring of employees" [hiring hall] provision also excludes "apprentices," as well as

"pre-apprentices, from its coverage and does not obligate Respondent to give the unions an opportunity to refer applicants for employment, but gives Respondent "the right to hire any particular person without going through the hiring hall." The June 1984 contract proposal omits the union security provision contained in the December 1983 contract proposal. The wage provision in the June 1984 contract proposal omits the two-tier system of wage rates for current employees and new hires, contained in the December 1983 contract proposal, and, unlike the December 1983 contract proposal, contains only a single employee classification, that of "journeyman," and proposes that journeymen plumbers and pipefitters receive a minimum hourly rate of pay, including vacation pay, of between "$7.50 and $20."[11] The "Health, Welfare, Vacation and Other Funds" provision in the June 1984 contract proposal eliminates Respondent's contribution to the "Apprentice and Journeymen Training Fund" contained in the December 1983 contract proposal and also, unlike the December 1983 contract proposal, imposes the following condition:

> The Employer shall continue to provide benefits pursuant to the above listed funds, until such time that pursuant to the Internal Revenue Code's anti-discrimination provisions, it becomes necessary to alter the employer's benefit program in order to maintain the qualified

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[11] The December 1983 contract proposal provides that current employed journeymen would receive a minimum hourly rate of pay, including vacation pay, of $16.77 and that new hires would receive $10. Under each proposal Respondent maintained the right to unilaterally increase those minimum wages.

> nature of such programs. In such case, all employees shall be eligible to participate in all employer group benefit plans, such as profit-sharing and major medical, as specified in each plan and the Employer shall then cease making contributions pursuant to the above listed facts.

On July 23, 1984 Local 3 filed its charge in Case 27-CA-8889 alleging Local 3 was a collective bargaining representative of an appropriate unit of all journeymen and apprentice plumbers employed by Respondent and, in violation of Section 8(a)(1) and (5) of the Act, Respondent on or about July 1, 1984 and continuing to date, failed and refused to bargain with Local 3 by unilaterally changing the wage rates, working conditions and terms of employment of the employees in the appropriate unit.

On August 15, 1984 Respondent sent Local 3 and Local 208 a new proposal which changed the benefit fund portion of Respondent's June 1984 contract proposal. More specifically, by identical letters dated August 15, 1984 Respondent notified the unions that with respect to the "Health, Welfare, Vacation and Other Funds" provision of its June 1984 contract proposal, that Respondent was now proposing to add the following language:

> Each employee covered by this agreement shall be given the option to participate in the above Plans [referring to the contract employee benefit plans] subject to the approval of the trustees of the various funds, or to participate in the Company's profit sharing plan and major medical plan subject to the rules for eligibility provided for in said plans.

In this letter Respondent also stated: "If you do not accept this change in our implemented proposal by

August 20, 1984, we will presume that you have rejected the change and we will implement it immediately."

Local 3 and Local 208 responded to Respondent's August 15, 1984 proposal by identical letters dated August 16, 1984 and August 20, 1984, respectively, in which they rejected the proposal and informed Respondent that Respondent's August 15 letter "contains proposals which have never been discussed or negotiated. We are prepared to meet with you to negotiate a new contract."

On August 22, 1984 in case 27-CA-8924 herein and on August 28, 1984 in case 27-CA-8889-2 herein, Local 208 and Local 3 respectively filed identical charges which allege that Local 208 and Local 3 are the collective bargaining representatives of an appropriate unit of all journeymen and apprentices employed by Respondent, and further allege that, in violation of Section 8(a)(5) and (1) of the Act, Respondent, on or about August 15, 1984, failed and refused to bargain with Local 208 and Local 3, "in that [Respondent], without discussion or bargaining with [Local 3/Local 208], has threatened to, and has, unilaterally altered the compensation and terms of employment of bargaining unit employees by revising the provisions of the employee pension, medical insurance, and vacation programs."

On September 25, 1984 Local 208 in case 27-CA-8924 herein filed an amended charge. The amendment added to the initial charge the allegation that commencing on or about February 22, 1984 and continuing to date Respondent had violated Section 8(a)(1) and (5) of the Act by

unilaterally changing the wage rates, working conditions and terms of employment of the unit employees.

5. The October 17, 1984 settlement agreements

On October 17, 1984 the Board's Regional Director for Region 27 approved an informal settlement entered into by Respondent and Local 3 in cases 27-CA-8889 and 27-CA-8889-2 and by Respondent and Local 208 in case 27-CA-8924. The settlement agreement in case 27-CA-8889 and 27-CA-8889-2 provides, in pertinent part, that Respondent would do the following:

> WE WILL NOT fail or refuse to bargain in good faith with Plumbers Local Union No. 3 concerning wages, hours, and other terms and conditions of employment for employees in the following appropriate bargaining unit:
>
> > All journeymen plumbers and gas fitters, apprentice plumbers and gas fitters, area plumber foremen, general plumber foremen, plumber foremen, journeymen pipefitters, apprentice pipefitters, area pipe fitter foremen, general pipefitter foremen, and pipe fitter foremen who are employed by the Employer, excluding all other employees, office clerical employees, guards and supervisors as defined by the Act.
>
> WE WILL NOT refuse to bargain in good faith by bargaining to impasse about provisions excluding employees from the appropriate unit described above.
>
> * * *
>
> WE WILL revoke and rescind retroactive to January 23, 1984 all unilateral reductions in pay and benefits affecting our employees in the

> appropriate unit described above and will make whole employees for all losses they sustained as a result of any such change. All other unilateral changes affecting unit employees will be revocable at the request of Plumbers Local Union No. 3.
>
> WE WILL, upon request, bargain in good faith with Plumbers Local Union No. 3 as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.
>
> WE WILL reimburse all employees, retroactive to January 23, 1984, in an amount equal to the difference between the wages and benefits which they would have received if the wage rates, and all other terms and conditions of their employment, had been continued without change, as they existed on January 23, 1984, and we will make remittance to all employee benefit trust funds to which we were obligated to make contributions under terms and conditions of employment as they existed on January 23, 1984, of the full amount of such contributions, less the sum of any contributions which we have made to each respective fund since said date. . . .

The settlement agreement also provided that "Al Farrell and all similarly situated employees, to be made whole by payment to each of them in the amount of backpay and benefits plus interest to be computed by the Regional Director in accordance with existing Board formula." The record reveals that Al Farrell was hired by Respondent as a plumber on June 27, 1984 and was terminated on July 25, 1984, (JT. Exh. 28(j) and Tr. p. 7) and was classified as a "pre-apprentice" and paid $12 an hour and that like all of the other plumbers in Respondent's employ classified

as pre-apprentices, Respondent did not contribute on his behalf into the contract benefit funds.

In entering into the settlement agreement with Local 208 in Case 27-CA-8924 Respondent agreed to abide by provisions which were identical to the above-described provisions in the agreement in Cases 27-CA-8889 and 27-CA-8889-2 between Local 3 and Respondent, with three modifications: (1) the appropriate unit in Local 208's settlement agreement included the classification "provisional apprentices" as being within the appropriate unit; (2) the two paragraphs contained in the Local 3 settlement agreement in which Respondent agrees to revoke and rescind the unilateral reductions in pay and benefits retroactively to January 23, 1984 and to reimburse the employees for their lost wages and benefits retroactively to January 23, 1984, had been changed in the Local 208 settlement agreement to read February 22, 1984 rather than January 23, 1984; and, (3) the Local 208 settlement agreement provides that "[Respondent] will make whole all affected employees by payment to each of them for backpay and benefits plus interest to be computed by the Regional Director in accordance with existing Board formula," and unlike the settlement agreement in the Local 3 case makes no mention of any particular employee or "similarly situated employees."

6. The 1985 negotiations

On February 28, 1985 the Unions and Respondent resumed collective bargaining negotiations and with the agreement of all parties, Respondent bargained jointly

with representatives of Local 3 and Local 208. Subsequently in 1985 five bargaining sessions were held: March 22; July 11; July 17; July 31 and August 7.

During the March 22, 1985 bargaining session the Unions submitted contract proposals for their respective bargaining units. These two proposals were identical in virtually all significant respects and for the sake of convenience are referred to as the Union March 22, 1985 contract proposal.

The Union March 22, 1985 contract proposal is effective from the date of execution until May 31, 1989. Its recognition provision provides for Respondent to recognize Local 3 as the exclusive bargaining agent of all employees employed by Respondent performing plumbing work in the plumbing industry within Local 3's jurisdiction and provides for Respondent to recognize Local 208 as the exclusive bargaining agent of all employees employed by Respondent performing pipefitting work in the pipefitting industry within Local 208's jurisdiction. The proposal also includes a hiring hall provision giving Local 3 and Local 208 the first opportunity to refer job applicants to Respondent.

Regarding wages, the Union March 22, 1985 contract proposal does not include the "special journeymen" classification included in the January 20, 1984 Local 208 contract proposal and does not provide for a change in the existing hourly rates of pay for journeymen or apprentices. It provides, however, that effective November 5, 1986 the minimum hourly rate of pay for journeymen plumbers and pipefitters would be increased to $19.07 and that apprentice plumbers would be paid the hourly

rate set forth in Respondent's December 1983 contract proposal and that the apprentice pipefitters would be paid between $1.70 and $2.16 an hour more than the apprentice plumbers.

The provision in the Union March 22, 1985 contract proposal entitled "Health, Welfare, Vacation and Other Funds," is identical with Respondent's December 1983 contract proposal insofar as the amount of the Respondent's employee benefit contributions are concerned.

During the next bargaining session held July 11, 1985 Respondent submitted to the Unions contract proposals for their respective units. These proposals, although in separate documents, are identical in content and for the sake of convenience are referred to as the Respondent's July 11, 1985 contract proposal. The duration of the July 11, 1985 contract proposal is from the date of its execution until May 31, 1986. In substance it is identical to Respondent's December 1983 contract proposal.

During the next bargaining session on July 17, 1985 Respondent asked the Unions' negotiators to identify the parts of the July 11, 1985 proposal which were "a problem to them" and asked the Unions' negotiators to list the problem items in order of priority and explain to Repondent's [sic] negotiators how they thought these items could be resolved. The Unions' negotiators complied with this request, as follows.

The Unions' negotiators requested an individual wage rate for each employee classification and the same rate of pay for current employees, new hires and recalled former employees, rather than the two-tier wage system proposed by Respondent.

The Unions' negotiators requested that "pre-apprentices," who were excluded from the contract bargaining unit under Respondent's contract proposal, be covered under the contract provisions dealing with "recognition," "union security," "hiring of employees," and "wages and benefits."

The Unions' negotiators objected to Respondent's proposed "working provisions" clause, which obligated employees to make corrections at the minimum wage for work which had to be redone because it did not meet required specifications, and obligated the Unions, if required by an arbitrator, to furnish the required materials to make these corrections and to reimburse Respondent 10 percent for extra overhead costs incurred because the work had to be redone.

The Unions' negotiators objected to the provision in Respondent's contract proposal entitled "Performance Appraisals" which, in substance, provided that wages negotiated in the contract were minimum wages and gave Respondent the right to unilaterally increase employees' wages and to grant employees incentive bonuses based upon productivity and performance.

The Unions' negotiators objected to the portion of Respondent's contractual "no strike-no lockouts" provision which provided that although employees covered by the contract would not be disciplined for refusing to cross an authorized AFL-CIO picket line, the employees would be expected to come to work if furnished a separate gate from the gate used by the picketing union.

The Unions' negotiators objected to the proviso in Respondent's proposed grievance and arbitration proposal which provided, "[t]he grievance and arbitration process in this Agreement shall be the only recourse the employees shall use against his or her Employer.

The negotiators discussed the section of Respondent's contractual hiring hall proposal which dealt with the right of Respondent to call for someone by name.

The negotiators discussed the duration of Respondent's proposed contract.

Regarding the proposed contract provision entitled "Health, Welfare, Vacation and Other Funds" the Unions' negotiators indicated that they wanted a penalty provision included for late employee benefit fund contributions.

The Unions' negotiators asked for certain unspecified changes in the contract management rights clause proposed by Respondent.

Lastly, the parties discussed the provision in Respondent's proposal entitled "Supervision" and the Unions' negotiators agreed that the matters contained therein were not negotiable.

At the next bargaining session held July 31, 1985 the parties discussed the wage rates presently being paid by nonunion contractors in the area and agreed nonunion contractors pay their employees between $10 and $12 an hour. Respondent submitted a revised contract proposal, which by its terms was effective on the date of execution until May 31, 1986. Respondent's negotiators informed

the Unions' negotiators that the revised proposal incorporated some of the changes requested by the Unions' negotiators at the last negotiation session. The Unions' negotiators stated they would review the company's new proposal and submit their contract proposal to Respondent at the next negotiation session.

Respondent's July 31, 1985 proposal differed from its July 11, 1985 proposal in the following respects: The contract "recognition," "union security" and "hiring of employees" provisions included the pre-apprentice classification which had been excluded from these provisions in the July 11 proposal;[12] the part of the contract grievance arbitration procedure proposed by Respondent, stating the grievance arbitration procedure was the only recourse the employee could use against Respondent, was qualified by the proviso, "This does not prevent an employee from filing a charge with the National Labor Relations Board or with the EEO after arbitrator's decision is rendered."; the "no strike-no lockouts" provision, stating employees were expected to come to work if they were furnished a separate gate, was supplemented in the July 31 proposal by the following language, "And the Employer is notified by the owner or owner's representative to man the project or the Employer will be in breach of contract and will be assessed all costs because of this action taken by the employees"; the provision dealing

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[12] The July 31 proposal, however, still gave Respondent the right to assign pre-apprentices to perform any work for which they were qualified and also provided, as did the July 11 proposal, that "the ratio of pre-apprentices shall be at the discretion of the Employer."

with the employees and Unions' obligations when employees' work failed to meet required specifications, was modified by Respondent's July 31 contract proposal but still required the employee to redo the work on his own time; the July 31 proposal omitted the "performance appraisals" provision which in substance gave Respondent the right to unilaterally increase the employees' wages; also in response to the Unions' request the July 31 proposal eliminated from the contract management rights clause the provision giving Respondent the exclusive right "to grant merit increases and incentive bonuses"; the section of Respondent's hiring hall proposal which reads, "If the employer desires to hire any particular person by name," was changed to read, "If the employer desires to hire one particular person by name, per job"; also in response to the Unions' concerns, the July 31 proposal added a penalty clause to the provision dealing with Respondent's obligation to contribute to the employee benefit funds; the July 31 proposal, which still retained the July 11 proposal's two-tier system of wages, proposed that current employees classified as "journeymen" would be paid a minimum hourly wage of $18.10 as contrasted to the hourly rate of $16.77 for this classification in the July 11 proposal; likewise under the July 31 proposal, when compared with the July 11 proposal, current employees classified as "apprentices" received an hourly increase of between 53 cents and $1.14 per hour depending upon the stage of their apprenticeship; the July 31 contract proposal provided for new hires and recalled employees classified as "journeymen" to receive a minimum hourly rate of $12, whereas the July 11 proposal set a minimum hourly rate of $10 for this

classification; likewise, under the July 31 proposal, when compared with the July 11 proposal, new hires and recalled unit employees classified as "apprentices" received an hourly increase of between 70 cents and $1.40 depending upon the stage of their apprenticeship; finally, while employees classified as "pre-apprentices" were not eligible under the July 11 contract proposal to receive benefits under the contract benefit plans, the July 31 proposal provides that pre-apprentices were eligible to receive health and welfare benefits under the contract's health and welfare plan.

At the next negotiation session held August 7, 1985 Respondent asked for the Unions' contract proposal. The Unions' negotiators replied by stating they did not intend to submit a contract proposal and handed Respondent's negotiators identical letters which read as follows:

> Plumbers Local Union No. 3's negotiating committee has reviewed the contract proposal you submitted on July 31, 1985. Your latest contract proposal is less favorable than previous offers in many respects. For example, it contains no provisions for payment of overtime, nothing about work periods, and no schedule of hours.
>
> Furthermore, your proposal fails to address the many items of concern to the Union that have been the subject of negotiations for the past two years. Your proposal still would allow you free reign to assign bargaining unit work to supervisors, including foremen who have been covered by all of our previous agreements with Howard Mechanical. Yet, you would exclude foremen from the recognition and union security clauses while retaining the right to designate foremen in unlimited numbers at your discretion. You also propose to be able to hire

"pre-apprentices" in unlimited numbers and to assign them work without any restriction. Under your proposal, a job could be manned entirely by so-called supervisors and pre-apprentices, and thereby deny any work to journeymen and apprentice members of the Union. And since no Pension contributions would be paid on supervisors or pre-apprentices, your proposal would provide a means for you to evade your obligations to the Pension Fund.

We have repeatedly objected to your various proposals for these reasons, just as you have repeatedly rejected our proposals that address these concerns. For example, you have adamantly (sic) refused to consider our proposal that would allow you to utilize helpers under existing ratios and for certain work.

We have also informed you on several occasions of our objection to your proposal for a one-year contract, the two-tier wage structure (under which all members of the Union would be treated as new or rehired employees at the low wage rate), to your call-by-name proposal, to the no-strike clause, to your proposal that employees must correct allegedly defective work on their own time without pay, and to numerous other regressive proposals. Your latest offer includes all of these previously rejected proposals, or worse.

It has been obvious to us for a long time that you do not truly want to reach agreement with this Local Union. You have repeatedly advanced proposals which would strip your employees of all the rights they have achieved over many years of collective bargaining. Your proposal to pay journeymen, licensed plumbers $12.00 an hour or one-third less than what Union Journeymen presently make is but one example of your total lack of good faith.

> You have gone through the motions of bargaining for over two years since our last agreement expired (sic) in May, 1983. We are no closer today in reaching an agreement than we were when negotiations commenced. We are convinced that this is what you intended all along.
>
> We will not continue to engage in this futile exercise. We reject your latest proposal and we will decline to make any further counter-proposals until and unless you substantiaally [sic] change your position on items which we are presently deadlocked on. As far as we are concerned, the parties are at impasse, and have been for sometime. Accordingly, we intend to advise the Trustees of the Pension Fund of the situation and request them to proceed to collect your withdrawal liability.

Respondent's negotiators denied the negotiations were at an impasse, and pointed out that at the last negotiation session on July 31, 1985 Respondent, as requested by the Unions, submitted a new contract proposal which had revised its previous proposal in several respects. The Respondent's negotiators stated Respondent had been prepared to make additional changes in its contract proposal in an effort to satisfy the Unions' complaints. The Unions' negotiators replied they were not interested in further negotiations and would notify the Trustees of the Pension Fund that negotiations had reached an impasse.

On August 27, 1985 Respondent, by identical letters to the Unions, replied to the Unions' above described August 7 letters, as follows:

> We were shocked to have your letter hand delivered to us at the early stages of our meeting August 7, 1985, because we were prepared to

present a proposal to you that contained a number of concessions as requested by you during our meeting of July 31, 1985.

We were also shocked to read in your letter statements which contradict those you have made in recent bargaining sessions, including some of which amount to your withdrawing previously granted concessions.

We strenuously disagree with your statement in your August 7, 1985 letter that you believe that the parties are at impasse. Rather, it is our position that substantial concessions have been made in recent meetings by both parties and we were prepared during our August meeting to present even more concessions.

Jack Howard is presently out of town and will not be back until September 16, 1985. Based on what we have already indicated to you we were prepared to do during our August 7, 1985 meeting, we accept your "challenge" to sit down and substantially change our position on a number of important items. We would request, therefore, that you contact us so that we may schedule the next couple of meetings to take place after Mr. Howard returns.

In closing, we wish to reiterate it is the company's position that the parties are not at impasse and that further negotiations will be most fruitful. We think it is unfortunate that you took the position expressed in your letter at the beginning of the August 7, 1985 meeting in light of the company being prepared to make some substantial concessions.

On September 10, 1985 the Respondent, by letter, notified the Unions it intended to file unfair labor practice charges if the Unions did not set a date for the resumption of negotiations.

On September 18, 1985 Local 3, and on September 20, 1985, Local 208, wrote identical letters to Respondent in response to its above described August 7 letter. In their response, the Unions, in pertinent part, stated:

> If you do in fact have a new proposal which you would like for us to consider, we suggest that you send it to us at your earliest opportunity. After we have had a chance to review your new proposal, we will contact you about scheduling another meeting. Meanwhile it remains our position that the parties are at impasse for the reasons stated in our letter of August 7.

On August 11, 1985 Respondent submitted to the Unions, by mail, separate but identical contract proposals. Respondent's October 11, 1985 contract proposal differs from its July 31, 1985 contract proposal in these respects: The provision in the July 31, 1985 proposal providing for the correction of work by employees was deleted in its entirety; the language concerning Respondent's late payment penalty for being late in making its contributions to the various contract benefit funds was revised to obligate Respondent to make these payments 5 days earlier, if it wanted to avoid incurring a penalty; the two-tier system of wages which divided employees into current and new or recalled employees was in effect abolished under the October 11, 1985 proposal. In this last respect, the minimum hourly wage rate for currently employed journeymen was reduced from the July 31 proposed hourly rate of $18.10 to $16.80 and the minimum wage rate for new hires or recalled journeymen was increased from the July 31, 1985 rate of $12 to $16.80. Consistent with the above changes the October 11, 1985 proposal proposed that the rates for currently employed

apprentices be reduced and that the rates be increased for newly hired or recalled apprentices, so that both groups would be paid the same minimum hourly rate. Lastly, the minimum hourly rate proposed by the October 11, 1985 proposal for the newly hired or recalled "pre-apprentices" was increased from $4 to $5 which was the rate being proposed for the currently employed "pre-apprentices."

Respondent's October 11, 1985 contract proposal failed to bring the Unions back to the bargaining table and there was no further contact between the parties about negotiations until June 24, 1986 when Respondent wrote the Unions that if they did not contact Respondent for a bargaining session by July 1, 1986 Respondent would file unfair labor practice charges with the National Labor Relations Board alleging they were refusing to bargain in violation of the Act.

Prior to Respondent's June 24, 1986 demand that the Unions resume bargaining, Respondent on or about May 29, 1986 had received a letter from the Fund Administrator of the Board of Trustees of the Colorado Pipe Industry Pension Fund, the fund Respondent had been obligated to contribute to during the term of the 1981-1983 contract on behalf of the unit employees' pension benefits. The letter informed Respondent that since the Fund's records indicated Respondent had not contributed to the Fund since December 31, 1984 and since the Fund had been advised that negotiations for a new contract between Respondent and the Unions had reached "impasse," the Fund's trustees concluded Respondent had "withdrawn from the Plan" and, accordingly, was subject "to the withdrawal liability provisions of the Multi-Employer

Pension Plan Amendments Act of 1980, a Federal enactment amending the Employee Retirement Income Security Act of 1974 (ERISA)." The Fund Administrator advised Respondent its withdrawal liability totalled $555,852.00 and demanded payment.

On July 17, 1986 Respondent wrote the Fund contesting its conclusion Respondent had withdrawn from the Plan and specifically challenged the assertion that negotiations between Respondent and the Unions were at an impasse.

On July 17, 1986 in Cases 27-CB-2373 and 27-CB-2374 Respondent filed charges against the Unions alleging that, in violation of Section 8(b)(3) of the Act, since about July 1, 1986 the Unions had failed and refused to meet and confer with Respondent in good faith at reasonable times and places. As of the date of the hearing in this case – January 21, 1987 – the Board's Regional Director for Region 27 had not made a determination on the merits of these charges.

On November 5, 1986 Respondent wrote the Unions separate but identical letters informing them that Respondent accepted their March 22, 1985 contract proposal in its entirety.

In November 1986, shortly after receiving Respondent's November 5, 1986 letter, the Unions wrote separate but identical letters to Respondent stating that their March 22, 1985 bargaining proposal was no longer open for acceptance due to the lapse of time and changed circumstances. The Unions informed Respondent they were treating Respondent's letter of November 5, 1986 as an adoption by Respondent of the Unions' March 22, 1985

contract proposal, which Respondent was now proposing for the Unions' acceptance. In order to properly evaluate the proposal, the Unions asked Respondent to furnish them certain information.

On November 26, 1986 Respondent renewed its demand to the Unions that they accept and execute the agreement embodied in their March 22, 1985 contract proposal. On December 2, 1986 the Unions reiterated their refusal to do this.

On December 8, 1986 Respondent filed charges against the Unions in Cases 27-CB-2425 and 27-CB-2425-2 alleging that since on or about December 2, 1986 the Unions had violated Section 8(b)(3) of the Act by refusing to meet with Respondent in good faith and by refusing to execute a collective bargaining agreement agreed to by the parties. As of the date of the hearing in this case the Regional Director for Region 27 had not made a determination on the merits of these charges.

B. *Discussion and Conclusions*

1. The settlement agreements

On July 23, 1984 in case 27-CA-8889 Local 3 filed a charge alleging in substance Respondent violated Section 8(a)(5) and (1) of the Act on or about July 1, 1984 by unilaterally changing the wage rates, working conditions and terms of employment of the employees represented by Local 3. On August 22, 1985 in case 27-CA-8924 Local 208 filed a charge and on August 28, 1984 Local 3 filed an identical charge in case 27-CA-8889-2 alleging that on or about August 15, 1984 Respondent violated Section

8(a)(5) and (1) of the Act by threatening to change and by unilaterally changing the provisions of the pension, medical insurance and vacation programs of the employees represented by the Unions. Lastly, on September 25, 1984, Local 208 filed an amendment to its charge in case 27-CA-8924 which alleged that commencing on or about February 22, 1984 and continuing to date Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the wage rates, working conditions and terms of employment of the employees represented by Local 208.

On October 17, 1984 the Board's Regional Director for Region 27 approved the settlement agreements entered into by and between the Unions, Respondent, and counsel for the General Counsel in the aforesaid cases.

The appropriate bargaining unit described in each of the settlement agreements includes within the unit the classifications of journeyman and apprentice plumbers and pipefitters, however, the unit description in the agreement covering the employees represented by Local 208 also includes the classification "provisional apprentices" as being within the unit.

In the settlement agreement covering the unit represented by Local 3, Respondent promises to "revoke and rescind retroactive to January 23, 1984" all unilateral reductions in pay and benefits affecting the unit employees and to reimburse the employees "retroactive to January 23, 1984" the difference between the wages and benefits they would have received if the wages and benefits had been continued "as they existed on January 23, 1984," and promises to make the employees' benefit

trust fund contributions which it was obligated to make on January 23, 1984. Also Respondent promises, upon request, to bargain in good faith with Local 3 as the exclusive representative of all the employees in the appropriate unit.

The language set forth in the settlement agreement covering the unit represented by Local 208 contains the identical language except that whenever the date "January 23, 1984" appears in the Local 3 agreement, it reads "February 22, 1984" in the Local 208 agreement.

January 23, 1984 is the start of the 10(b) limitations period for the charges filed by Local 3 in Cases 27-CA-8889 and 27-CA-8889-2. The start of the 10(b) limitations period for the charge filed by Local 208 in Case 27-CA-8924 is February 22, 1984.

No evidence was presented about the negotiations between the parties which led up to and resulted in the settlement agreements. Nevertheless, Respondent contends, "[t]here was an oral understanding that the agreements would be interpreted in accordance with Respondent's position." Respondent, in support of this contention, relies upon its attorney's letter of February 28, 1985 sent to the Regional Director in Cases 27-CA-8889 and 27-CA-8889-2. This letter was sent several months after the settlement agreements were executed, when the Regional Director was investigating the Unions' claim that the agreements had not been complied with. In this letter Respondent's attorney informed the Regional Director: "As you know, the agreement for purposes of remedy goes back to January 23, 1984. It was made very clear in the discussions between myself and the Region

prior to executing the settlement agreement that as to remedy the company's offer [referring to the December 1983 contract offer], which was put in effect in January prior to the 23rd, did not have to be disturbed."

Respondent's contention is without merit because (1) no evidence was presented that in fact Respondent's attorney before executing the settlement agreement had reached an understanding with the representatives of the Regional Director or the General Counsel or the Unions, or even informed them, it was his understanding that the terms of the settlement agreements would not disturb Respondent's December 1983 contract proposal which had been implemented; and, (2) the Regional Director in response to Respondent's attorney's February 28, 1985 letter wrote the attorney denying that the attorney had ever communicated such an understanding to the Region prior to his February 28, 1985 letter. The fact the Regional Director failed to answer the February 28, 1985 letter from Respondent's attorney for several months and the lapse of time between the execution of the settlement agreements and the start of the Regional Director's investigation into whether or not Respondent had complied with the agreements, is insufficint [sic] to establish Respondent's claimed oral understanding.

Subsequent to the execution on October 17, 1984 of the settlement agreements, Respondent continued to classify each plumber and pipefitter it hired as a "pre-apprentice" and to unilaterally establish their hourly rates of pay, and did not contribute on their behalf to the employee benefit funds established by the 1981-1983 contract.

In or about the fall of 1985 a representative of the Board's Regional Director advised Respondent's lawyer it appeared Respondent had not complied with the terms of the settlement agreements because it was continuing to classify the plumbers and pipefitters it was hiring as "pre-apprentices" and was in effect excluding them from the collective bargaining unit with respect to their wages and other employment benefits. Respondent's lawyer took the position that in continuing to hire plumbers and pipefitters and classifying them as "pre-apprentices," Respondent was acting consistent with the terms of the settlement agreements. He explained that Respondent's December 1983 contract proposal gave it the right to classify all of its pipefitters and plumbers as pre-apprentices and to exclude them from the coverage of the proposal's fringe benefit provisions, and to unilaterally set their rates of pay, as long as they were paid at least $4 an hour. Therefore, Respondent's lawyer explained, since the terms of the December 1983 contract proposal had been implemented in January 1984, prior to either January 23, 1984 or February 22, 1984, there was nothing for Respondent to rescind or revoke. In short, Respondent's lawyer took the position that when Respondent, pursuant to the settlement agreements, agreed to restore the status quo to January 23, 1984 in the case of the Local 3 bargaining unit and to February 22, 1984 in the case of the Local 208 bargaining unit, it had merely agreed to abide by the terms and conditions contained in Respondent's December 1983 contract proposal. The representative of the Regional Director responded by informing Respondent's lawyer that the Regional Director had approved the settlement agreements with the understanding Respondent's

December 1983 contract proposal had not been implemented and that the only proposal of Respondent which had been implemented was the one it had implemented July 1, 1984, and that under the terms of the settlement agreements the status quo envisioned by the Regional Director consisted of the terms and conditions of employment set by the 1981-1983 contract, not the Respondent's December 1983 contract proposal.

In the instant proceeding the General Counsel contends the Regional Director was justified in setting aside the settlement agreements for two reasons: (1) Respondent failed to comply with the terms of the settlement agreements by continuing to classify its plumbers and pipefitters as pre-apprentices and treating them as non-unit workers whose wages and benefits were established unilaterally by Respondent; and (2) by proposing in July 1985 that it be granted the right to retain unilateral control over all aspects of the pre-apprentices' terms and conditions of employment, Respondent engaged in bad-faith bargaining in violation of Section 8(a)(5) of the Act, which also violated the terms of the settlement agreements.

I have serious doubts whether the General Counsel's second alleged justification for the Regional Director's decision to vacate the settlement agreements is encompassed within the scope of the pleadings. Assuming it is, it is without merit. The fact that in July 1985 Respondent proposed that the Unions accept a contract which would grant Respondent the right to hire pre-apprentices in unlimited number and to assign them to do bargaining unit work without any restriction, does not warrant the inference Respondent was not bargaining in good faith

with a sincere desire to reach a collective bargaining agreement. Nor is there other evidence which, when coupled with Respondent's proposal concerning the pre-apprentices, would warrant the inference Respondent in July 1985 was not bargaining in good faith with a sincere desire to reach an agreement.

Insofar as the General Counsel is contending that in July 1985 Respondent in its bargaining with the Unions insisted to impasse upon a nonmandatory subject – the exclusion of plumbers and pipefitters classified as pre-apprentices from the units – there is no evidence to support this contention. In Respondent's July 31, 1985 contract proposal which was made immediately after the Unions expressed their opposition to Respondent about Respondent's proposal to exclude pre-apprentice plumbers and pipefitters from the units, Respondent specifically included the pre-apprentices within the coverage of the contract recognition, union security and hiring hall provisions and dropped its proposal which would have given it unilateral control over the pre-apprentices' wages, and agreed that the pre-apprentices would be covered by the contract's health insurance provision. The fact that Respondent was still proposing that pre-apprentices not be covered by the contract's pension plan and that Respondent be given the right to hire an unlimited number of pre-apprentices and to assign them to do plumbers and pipefitters work without restriction does not establish Respondent was making a contract offer which in effect excluded the pre-apprentices from being represented by the Unions.

Regarding General Counsel's contention that Respondent violated the terms of the settlement agreements by

continuing to hire plumbers and pipefitters whom it classified and treated as pre-apprentices, I am of the opinion there was no meeting of the minds by the parties insofar as the settlement agreements affected Respondent's right to employ plumbers and pipefitters and classify them as pre-apprentices.

In its December 1983 contract proposal Respondent proposed it be given the right to hire an unlimited number of pre-apprentices who would be excluded from the contract's recognition, union security and hiring hall provisions, and to assign them to do unit work without restriction and to pay them whatever wage rates it desired so long as it paid them a minimum wage of $4 an hour. On December 29, 1983 Respondent told Local 3 it intended to implement the December 1983 contract proposal in the Local 3 unit effective January 1, 1984, and on January 26, 1984 told Local 208 it intended to implement the December 1983 contract proposal in the Local 208 unit because the parties were at an impasse. Subsequently, in April and May 1984, the first time Respondent's manpower requirements necessitated the employment of additional plumbers or pipefitters, Respondent hired plumbers and pipefitters and classified all of them as pre-apprentices and unilaterally set their rates of pay and excluded them from the coverage of the expired contract's fringe benefit provisions. The October 17, 1984 settlement agreements obligated Respondent to restore the status quo to things as they existed on January 23, 1984 in the Local 3 bargaining unit and to things as they existed on February 22, 1984 in the Local 208 bargaining unit. The above-described circumstances persuade me

that when Respondent read the above-described language of the settlement agreements it could have reasonably believed they meant Respondent was obligated to live up to the terms of its December 1983 contract proposal insofar as the employment of pre-apprentices was concerned.

On the other hand it was perfectly reasonable for the Unions and the General Counsel to believe that by executing the settlement agreements Respondent had agreed to restore the status quo as it existed before January 1, 1984 when the 1981-1983 contract governed the terms and conditions of employment of employees represented by the Unions. Thus the dates of January 23, 1984 and February 22, 1984 are not tied timewise to the start of any of the unilateral acts of conduct involved in this case. Rather these dates are specifically tied to the 6 months limitation period set forth in Section 10(b) of the Act. The reason for this is because the Board's normal remedy for violations of the kind of unilateral conduct alleged in the Unions' charges is limited to the 10(b) period. See, *Al Bryant, Inc. et al.*, 260 NLRB 128, fn. 3 (1982). Under the circumstances I am persuaded it was not unreasonable for the Unions and the General Counsel to believe that the intent of the settlement agreements was to restore the status quo to the terms and conditions of employment which were in place prior to Respondent's implementation of the December 1983 contract proposal and to believe that the reason January 23, 1984 and February 22, 1984 were used in the settlement agreements, as the dates on which the status quo was to be restored, was that as a matter of law it was necessary to confine the agreements' make-whole remedy to periods commencing on those dates.

Also in assessing the intent of the parties when they entered into the settlement agreement in Cases 27-CA-8889 and 27-CA-8889-2 it is significant that included in this settlement is a provision which provides that Respondent shall make whole Al Farrell, who was hired by Respondent as a pre-apprentice plumber on June 27, 1984, and all of the other plumber pre-apprentices similarly situated, for their loss of wages and fringe benefits caused by Respondent's alleged unfair labor practices. The settlement agreement makes sense only if the intent of the agreement was to make Farrell and the other similarly situated pre-apprentices whole for the loss of their wages and fringe benefits incurred as a result of Respondent's implementation of its December 1983 contract proposal. For, the make whole provision could not have been referring to either Respondent's alleged July 1, 1984 or August 15, 1984 unilateral changes in the employees' wages and conditions inasmuch as these changes did not in any way adversely affect the pre-apprentices' terms and conditions of employment.[13] Previously, when it implemented the December 1983 contract proposal, Respondent had instituted the provisions dealing with the pre-apprentices, which provisions were not changed in any way by the Respondent's subsequent proposals of June 19, 1984 or August 15, 1984.

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[13] It would have been very easy for the parties to have made the make whole provision dealing with Farrell and the other "similarly situated" pre-apprentices retroactive to July 1, 1984 if the intent of the settlement agreements had been to simply restore the status quo as of the period of time immediately prior to the implementation of Respondent's June 19, 1984 and August 15, 1984 contract proposals.

Based upon the foregoing I am of the opinion that assuming Respondent's interpretation of the settlement agreements was a reasonable one, and accurately reflects what was in its mind at the time of the settlements, that the Unions and the General Counsel had markedly different ideas as to what the settlements were intended to cover and that their interpretation was a reasonable one. In other words, there was no meeting of the minds when the settlement agreements were executed. It is for this reason that I find the Regional Director properly set aside the settlement agreements in these cases.

Respondent asserts that principles of contract construction preclude me from considering General Counsel's and the Unions' interpretation of the settlement agreements. This argument is without merit. First, even under the technical principals of contract law an examination of the parties' different understandings of the settlement agreements warrants the conclusion that there was no meeting of the minds. See, *Corbin on Contracts*, Sec. 104 (1963) (" . . . If the parties had materially different meanings [of the language], and neither one knew or had reason to know the meaning of the other, there is no contract."); *Williston on Contracts*, Sec. 1541 (1957); *Apache Powder Co.*, 223 NLRB 191, 195 (1976). Respondent's construction of the settlement agreements ignores a significant number of the relevant circumstances, including the legal circumstances involving the limitations proviso to Section 10(b) of the Act, which demonstrate that the Unions and General Counsel could reasonably understand that the dates contained in the settlement agreements were merely remedial cut-off dates required by the statute's 10(b) limitations period and were not meant to

legitimatize the implementation of the contract pre-apprentice provisions proposed by Respondent.

In any event, paraphrasing the Fourth Circuit's language, "general contract principles alone [do not] govern this issue." *George Banta Company, Inc. v. NLRB*, 604 F.2d 830, 835 (C.A. 4, 1979). The "disposition of unfair labor practice charges [pursuant to settlement] involves not simply an adjustment of the rights of private parties, but also a broader public interest," and it is the "ultimate responsibility of the agency . . . to insure that the public interest is served by a settlement." *Id.* at 836. In this regard, the Board, with Supreme Court approval, has a long standing policy of setting aside settlement agreements in order to insure that the policies of the Act are not frustrated by an ineffectual agreement. *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944). Whenever a settlement fails to achieve its purpose – i.e., to end labor disputes, extinguish their causative elements and restore labor peace (*Wallace Corp. v. NLRB*, 323 at 254) – the Board will set it aside. E.g., *International Photographers of the Motion Pictures Industries*, 197 NLRB 1187 (1972), enfd. 477 F.2d 450 (C.A. D.C. 1973). In determining whether the settlement has accomplished its objective the Board does not rely on "a mechanical application of a rigid a priori rule," but instead utilizes "the existence of sound judgment based upon all of the circumstances of each case." *Ohio Calcium Company*, 34 NLRB 917, 935 (1941). Where a settlement, under the circumstances, effectuates the purposes of the Act, it will not be set aside, but where "subsequent events have demonstrated that efforts and adjustments have failed to accomplish their purpose . . . there is no estoppel

to further Board proceedings." *Wallace Corp. v. NLRB*, 323 U.S. 248, 254-255 (1944).

In the instant case, the purposes of the Act are plainly served by the Regional Director's withdrawal of approval from the settlement agreements, since the settlements proved insufficient to lay to rest the rights and obligation of the parties and left their labor dispute unresolved. See *International Photographers of the Motion Pictures Industries*, 197 NLRB 1187 (1972), enfd. 477 F.2d 450 (C.A. D.C. 1973) where the Board affirmed the Regional Director's withdrawal of approval from an informal settlement agreement, concluding that "this was a case where no agreement was reached" and that "it would be inequitable to hold the parties to the commitments contained in the settlement." In *International Photographers* approval was withdrawn from the agreement even though there was no ambiguity in the language of the agreement itself; rather, the deficiency in the agreement was that each party reasonably made widely divergent assumptions about the implementation of its terms. See also, *City Cab Company of Orlando v. NLRB*, 122 LRRM 2392, 2396-2397 (C.A. 11, April 28, 1986).

2. The December 1983 contract proposal

During the negotiations covering Local 3's unit, Respondent submitted a new contract proposal to Local 3 on December 29, 1983, which it characterized as its "final offer," and told Local 3 it intended to implement this offer effective January 1, 1984.

During the negotiations covering Local 208's unit, Respondent submitted a new contract proposal to Local 208 on December 30, 1983, which it characterized as "its last offer," and subsequently on January 26, 1984, after Local 208 rejected the December 30 contract offer and Respondent had rejected Local 208's counteroffer, Respondent informed Local 208 that negotiations had reached an impasse and Respondent intended to implement its last contract proposal.

One of the provisions included in Respondent's December 1983 contract proposal,[14] excluded all plumbers and pipefitters classified as "pre-apprentices" from the proposed contract's recognition, union security, hiring hall and benefit provisions and gave Respondent the right to hire pre-apprentices in unlimited numbers and to assign them bargaining unit work without restriction and the right to unilaterally set their rates of pay as long as they were paid at least $4 an hour.

In 1984 it was not until April 30 that Respondent hired its first plumber or pipefitter, and when it hired that plumber it classified him as a pre-apprentice and thereafter during 1984 and 1985 whenever Respondent employed plumbers or pipefitters it classified them as pre-apprentices and consistent with the December 1983 contract proposal treated them as nonunit employees.

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[14] As noted *supra*, for the sake of convenience the above-described December 29, 1983 and December 30, 1983 contract proposals are referred to collectively as Respondent's December 1983 contract proposal.

On July 23, 1984 Local 3 filed its initial charge in this case and on August 22, 1984 Local 208 filed its initial charge. Thus, the 6-months limitations period prescribed by Section 10(b) of the Act commenced in Local 3's bargaining unit January 23, 1984 and in Local 208's bargaining unit February 22, 1984.

The complaint in this case alleges that on or about December 29, 1983, in the unit represented by Local 3, and on or about December 30, 1983, in the unit represented by Local 208, Respondent demanded, as a condition of consummating any collective bargaining agreement, that the Unions agree to a provision that altered the existing appropriate bargaining units by excluding from the units plumbers and pipefitters classified as "pre-apprentices," and that in furtherance and in support of this demand Respondent, on those dates, "bargained to an unprivileged and invalid impasse" (complaint, paragraphs 9(a), (b), (d) and (e)). The complaint further alleges Respondent violated Section 8(a)(5) and (1) of the Act when, on or about January 23, 1984 in the Local 3 unit, and on or about February 22, 1984, in the Local 208 unit, "at a time when no good faith impasse existed," Respondent unilaterally altered the wages and benefits of the units' employees including the employees classified as "pre-apprentices" (complaint, paragraphs 12(d) and 13(d)).

In its post-hearing brief in support of the complaint allegations counsel for the General Counsel argues at page 9:

> *Any impasse the Respondent (d)eclared in December over the pre-apprentice(s) . . . was invalid. Therefore, Respondent could not implement the changes in the*

> *bargaining unit. The Respondent violated Section 8(a)(5) when it implemented the unit changes following an invalid impasse.* [Emphasis added.]

And further argues at page 10 of her brief:

> (T)he Respondent announced to the Plumbers on December 29, its intent to implement its final offer effective January 1, 1984. The Respondent announced to the Pipefitters on January 20 that its final offer would be implemented. *Since it was an invalid impasse, the Respondent could not implement its final offer.* The Plumbers and Pipefitters hired by the Respondent following the invalid implementation, as well as employees already employed by Respondent in December, were lawfully part of the existing bargaining unit. By classifying these employees as nonunit pre-apprentices, assigning them unit work, and failing to apply to them unit wage rates and terms of employment, the Respondent unilaterally change(d) the scope of the unit and violated Section 8(a)(5). [Emphasis added.]

In its post-hearing brief in support of the complaint's allegations, counsel for the Charging Parties asserts that, "the first issue to be decided on the merits of the case itself is whether or not the Company bargaining [sic] to an unprivileged and invalid impasse."

Respondent takes the position that the complaint's allegations which pertain to the implementation of the pre-apprentice provisions contained in its December 1983 contract proposal should be dismissed because they are time barred by the 6-month limitations proviso to Section 10(b) of the Act. Respondent's 10(b) defense is meritorious.

A decision on how to apply Section 10(b) to the facts of this case must be made in the light of the statute's underlying policy. The Supreme Court has described the policy of the statutory time limit as "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question had become dim and confused' " and "of course to stabilize existing bargaining relationships." *Local Lodge No. 1424, International Association of Machinists v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411, 419 (1960) quoting H. R. Rep. No. 245, 80th Cong., 1st Sess. 40 (1947). In *Bryan* the court interpreted Section 10(b) of the Act as precluding the filing of an unfair labor practice charge which was grounded on events pre-dating the limitations period. There the court distinguished between two situations:

> The first is one where occurrences within the 6-months limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose Section 10(b) ordinarily does not bar such evidentiary use of anterior events. [Footnote omitted.] The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time barred, to permit the event itself to be so used in effect results in

reviving a legally defunct unfair labor practice. 362 U.S. at 416-417.

In *Bryan* the situation fell within the second category, "for the entire foundation of the unfair labor practice charged was the union's time barred lack of majority status when the original collective bargaining agreement was signed." 362 U.S. at 417.

In the instant case the charged misconduct which occurred within the 10(b) period – Respondent's exclusion from the units of employees performing unit work by classifying them as "pre-apprentices" – is alleged to be an unfair labor practice relying solely upon Respondent's earlier alleged illegal conduct which pre-dated the start of the 10(b) period; its insistence as a condition precedent to entering into a collective bargaining agreement with the Unions, that the Unions agree to permit Respondent to exclude employees from the unit doing unit work by classifying them as "pre-apprentices." This is the theory of the complaint, as set out specifically in the complaint and in the General Counsel's and Charging Parties' briefs, and is the way the case in fact was litigated. In other words, not only do all of the operative facts essential to establishing the unfair labor practices charged in this case take place outside of the 10(b) period, but the counsel for the General Counsel, as alleged in the complaint, must prove that this pre-10(b) conduct constituted an unfair labor practice in order to prove, as alleged in the complaint, that Respondent's conduct within the 10(b) period violated the Act. Thus, the entire foundation for the alleged unfair labor practices is another alleged unfair labor practice which is admittedly time barred by the Section 10(b) limitations period. *Bryan* does not allow

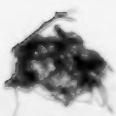
this. It is for these reasons that I am persuaded the complaint's allegations that Respondent refused to bargain within the meaning of Section 8(a)(5) of the Act by unilaterally altering the wages and benefits of the units' employees commencing on January 23, 1984 and February 22, 1984, the start of the respective 10(b) periods, are barred by the 6-month limitations proviso to Section 10(b) of the Act. *The Catholic Medical Center of Brooklyn and Queens*, 236 NLRB 497, 500-501 (1978); *Durfee's Television Cable Company*, 174 NLRB 611, 613-614 (1969). I therefore shall recommend the dismissal of these allegations in their entirety.

Harvard Folding Box Company, 273 NLRB 841, 845-847 (1984), cited by the Charging Parties, is inapposite because, unlike the instant case, it was not litigated based upon the theory that the alleged unfair labor practice was inextricably tied to another unfair labor practice which occurred outside of the 10(b) period. Also in *Harvard Folding Box*, the Board concluded that the start of the 10(b) period was tolled because the employer's announcement of its unilateral change in vacation pay policy was made to the employees and not the union, which did not learn about the new policy for several months. Here, as I have found *infra*, the Unions' knowledge of the disputed unilateral changes pre-dated the start of the 10(b) limitations period. Finally, insofar as *Harvard Folding Box* holds that the employer's announcement of the unilateral change in its vacation pay policy would have been insufficient to start the 10(b) period, even if it had been made to the union, it relied in substantial part upon *California School of Professional Psychology*, 227 NLRB 1657 (1977) which was specifically overruled

by the Board in *United States Postal Service Marina Mail Processing Center*, 271 NLRB 397 (1984).

I also reject the Charging Parties' contention it was not until Respondent began to hire employees to perform unit work and classified them as "pre-apprentices" that the Unions first learned of this policy, thereby tolling the start of the 10(b) limitations period. As I have found *supra*, the Unions were told by Respondent, outside of the start of the 10(b) period, it was implementing the December 1983 contract proposal which excluded all employees performing bargaining unit work whom Respondent chose to classify as "pre-apprentices" from the contract's recognition, union security, hiring hall and benefit provisions and gave Respondent the right to hire pre-apprentices in unlimited numbers and to assign them to bargaining unit work without any restriction and the right to unilaterally set their rates of pay as long as they were paid $4 an hour. This notification clearly placed the Unions on sufficient notice of the alleged unfair labor practices to file a charge. *Postal Service Marina*, 271 NLRB 397 (1984); *Carter-Glogau Laboratories*, 280 NLRB No. 49 (June 19, 1986).

The fact Respondent did not have an occasion for approximately 4 months to utilize its new policy of classifying employees performing unit work as "pre-apprentices," does not detract from the fact that the Unions were clearly and unequivocably [sic] advised, prior to the start of the 10(b) period, that Respondent was implementing its December 1983 contract offer which contained this new policy. As I have found *supra*, in 1984, it was not until April and May that Respondent hired its first unit employees at which time, and at all times thereafter



whenever it hired unit employees, Respondent classified them and treated them as "pre-apprentices." Under these circumstances, Respondent's failure to utilize its new policy concerning the "pre-apprentices" prior to April-May 1984 could not have reasonably led the Unions to believe Respondent did not intend to implement that portion of its December 1983 contract proposal.

I also reject the Charging Parties' contention that by failing to implement certain provisions of its December 1983 contract proposal, Respondent "lulled the unions into believing Respondent continued to abide by the expired contract rather than implement the December 1983 proposals, as threatened." In this regard, as I have found *supra*, there is evidence Respondent did not implement the terms of its 1983 contract proposal in only two respects: mailing contract benefit payment contributions to the Fund, whereas the December 1983 contract proposal provided the payments be mailed to the Unions which would transmit them to the Fund;[15] and, continuing to pay contributions to the Contract Administration Fund as it had agreed to do under the terms of the 1981-1983 contract, whereas the December 1983 contract offer omitted this contribution.

No one from the Unions testified that because Respondent continued to pay benefit contributions directly to the Fund and continued to contribute to the Contract Administration Fund, that this led the Unions to

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[15] The 1981-1983 contract is silent on this subject.

believe Respondent had changed its mind about implementing the terms of the December 1983 contract proposal, including the pre-apprentice provisions, and instead was continuing to abide by the terms and conditions of the expired 1981-1983 contract. Nor does Respondent's failure to implement the December 1983 contract proposal in these two respects, on its face warrant the inference it led the Unions to believe this. Thus, there is no evidence it was ever brought to the Unions' attention, during the time material herein, that Respondent was still contributing to the Contract Administration Fund. And mailing the benefit fund contributions directly to the Fund instead of indirectly to the Fund through the Unions, was not the kind of conduct which would have reasonably led the Unions to believe Respondent was continuing to abide by the terms of the expired 1981-1983 contract rather than implementing its December 1983 contract proposal.

3. The June 19, 1984 contract proposal

On June 19, 1984, when negotiations resumed after a hiatus of several months, Respondent made another contract proposal to the Unions. It was identical to Respondent's last proposal of December 1983 insofar as it excluded "pre-apprentices" from the contract bargaining unit. In addition to pre-apprentices, it also excluded "apprentices" from the contract unit, even though they had been specifically included within the unit encompassed by the 1981-1983 contract.

The Respondent sent its June 19, 1984 contract proposal to the Unions by mail at which time it wrote the

Unions it was prepared to discuss the proposal at the Unions' request, but that the proposal "must be accepted in total, prior to July 1, 1984" and that it "will be implemented in its entirety July 1, 1984."

On July 27, 1984 and July 3, 1984 Local 3 and Local 208 wrote Respondent rejecting the June 19, 1984 contract proposal and advised Respondent they wanted to meet with it to discuss the terms of a new contract.

No meetings were held between the parties concerning the June 19, 1984 contract proposal which was implemented July 1, 1984.

General Counsel contends that the changes in the employees' wages and benefits instituted as a result of Respondent's July 1, 1984 implementation of its June 19, 1984 contract proposal constitute unlawful unilateral changes in the employees' existing terms and conditions of employment because the proposal's exclusion from the bargaining units of the pre-apprentices and apprentices was a nonmandatory subject of bargaining which Respondent insisted upon as a condition precedent to entering into an agreement with the Unions, thereby constituting a refusal to bargain in good faith which precluded a genuine impasse on any of the terms set forth in the June 19, 1984 proposal. Alternatively, General Counsel appears to argue that Respondent's July 1, 1984 unilateral changes in the employees' wages and benefits was unlawful because Respondent has not shown that these new wages and benefits, which were a part of its June 19, 1984 contract proposal were implemented after an impasse in bargaining.

It is settled that to insist to impasse on nonmandatory subjects of bargaining is an unfair labor practice in violation of Section 8(a)(5). *NLRB v. Borg-Warner*, 356 U.S. 342, 349 (1958). In explaining what constitutes impasse bargaining by an employer in the context of proposing a nonmandatory subject, the Board has indicated that before it will conclude an impasse has occurred, the union must have placed the employer on notice that it objects to the alleged nonmandatory bargaining proposal so that the employer will be afforded an opportunity to withdraw this proposal from his overall contract proposal. Thus, in *Union Carbide Corporation*, 165 NLRB 254, 255 (1967) the Board stated:

> It is well settled, however, that [the statutory] obligation to bargain does not mean that bargaining must be confined to the statutory subjects (case). Either party may lawfully propose nonmandatory bargaining items. Neither party may insist, however, nor condition its bargaining or the execution of any agreement, upon acceptance of such demand by the other party (case). The Respondent, therefore, did not violate its duty to bargain when, on June 2, it initially proposed certain modifications in the current pension-insurance agreement. Nor was it unlawful insistence for Respondent to refer to its June 2 "package" offer during two subsequent bargaining sessions when the union's wage and vacation demands were discussed. For, the union had not expressly and unequivocally rejected that offer or the nonmandatory bargaining demand contained therein. After Respondent presented its "final offer" on June 29, the union negotiators for the first time declared their opposition to Respondent's injection of the nonmandatory issue into the basic contract negotiations. In these circumstances,

> however, it can hardly be said that Respondent's insertion of the nonmandatory subject in its "final offer" of June 29 constituted unlawful insistence in the face of a clear and express refusal by the union to bargain about the pension insurance modifications (case).

Similarly, the Board in *National Fresh Fruit & Vegetable Company*, 227 NLRB 2014, 2016 (1977) stated:

> . . . The controlling factors in determining whether a party insisted unlawfully upon a subject in the course of bargaining are (1) whether the demand was on a mandatory or voluntary subject of bargaining and (2) whether the insisting party persisted in demanding the nonmandatory provision in the face of continuing rejection by the other party. . . .

In the instant case there is no evidence that prior to Respondent's June 19, 1984 contract proposal or in response to that proposal that the Unions told Respondent they were opposed to Respondent's interjection of the alleged nonmandatory issues contained therein into the contract negotiations. The Unions' approach, insofar as this stipulated record shows, was simply to reject Respondent's December 1983 and June 19, 1984 contract proposals in their totality without specifying which provisions it objected to or the basis for their objections; the Unions did not specifically object to the inclusion of the alleged nonmandatory bargaining items in Respondent's proposals. There is no evidence that the Unions had reason to believe that such an objection would have been futile. Quite the opposite, after the negotiations resumed in July 1985, when the Unions for the first time expressed their objection to Respondent's proposal excluding preapprentices from the units, Respondent immediately

withdrew this proposal from its contract offer.[16] Under the circumstances, the lack of evidence that Respondent insisted on the alleged nonmandatory provisons [sic] in the face of the Unions' objection to those provisions, I am persuaded the General Counsel has failed to prove that when Respondent on July 1, 1984 implemented the wage and benefit provisons [sic] of its June 19, 1984 contract proposal that it did so in the context of having insisted upon the alleged nonmandatory subjects as a condition precedent to entering into any agreement with the Unions.[17] Cf. *Bozzuto's Inc.*, 277 NLRB No. 100 (Dec. 6 1985) (Employer bargained to impasse over a nonmandatory subject – the alteration of the bargaining unit – where the union "made clear [to the employer] that it would not change the unit and would not recommend to its members a package containing such a change.")

I am also persuaded that when on July 1, 1984 Respondent changed the employees' wages and benefits pursuant to the terms of its June 19, 1984 contract

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[16] Upon the resumption of negotiations in July 1985, Respondent had previously withdrawn the contract provision excluding "apprentices."

[17] "[I]n evaluating whether the parties have insisted to impasse on a particular nonmandatory subject of bargaining, the Board and courts have looked to whether agreement on the mandatory subjects of bargaining are conditioned on agreement on the nomandatory [sic] subjects of bargaining (cases)" *Taft Broadcasting Company*, 274 NLRB 260, 261 (1985). See also, *Latrove Steel Company v. NLRB*, 105 LRRM 2393, 2398 (C.A. 3. August 19, 1980) ("What *Borg-Warner* prohibits is insistence upon a nonmandatory subject as a condition precedent to entering an agreement").

proposal that the record shows the parties had bargained to an impasse.[18]

The last time the parties communicated with one another about the bargaining negotiations prior to Respondent's June 19, 1984 contract proposal was December 29, 1983 in the Local 3 unit and January 26, 1984 in the Local 208 unit. On those dates, as described in detail above, the negotiations were deadlocked without any realistic possibility that continuation of the negotiations would be fruitful. This is vividly demonstrated by the fact that for the next four and one-half months, until Respondent transmitted its June 19, 1984 contract proposal, there was no bargaining sessions and there is no evidence that any of the parties made an effort to schedule further contract negotiation meetings. Respondent's June 19, 1984 contract proposal, clearly was not calculated to break the impasse in the negotiations. Its provisions were substantially worse insofar as the Unions were concerned, thus leaving the parties even further apart.[19] These circumstances have persuaded me that when

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[18] An impasse in collective bargaining negotiations exists when "good faith negotiations have exhausted the prospects of concluding an agreement" or when "there [is] no realistic possibility that continuation of discussions . . . would be fruitful." *American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622, 624, 628 (C.A. D.C. 1968).

[19] The June 19, 1984 contract proposal omitted the union security and the exclusive union hiring hall provisions, and for the first time excluded the apprentices from the unit, and lowered the hourly wage rate for journeymen, and subjected the continuation of Respondent's benefit contributions to a new condition.

Respondent implemented its June 19, 1984 contract proposal that negotiations between the parties were still at an impasse.[20]

Based upon the foregoing, I find that when Respondent unilaterally changed the employees' wages and benefits on July 1, 1984 by implementing its June 19, 1984 contract proposal, that it did so after it had bargained with the Unions to a valid impasse. I therefore shall recommend the allegations pertaining to this conduct be dismissed in their entirety.

4. The August 15, 1984 contract proposal

As set forth in detail *supra*, on August 15, 1984 Respondent sent the Unions a new proposal modifying its June 19, 1984 contract proposal in one respect; it gave the employees covered by the contract an option to participate in either the contract benefit plans or the Respondent's profit-sharing and major medical plans. Respondent wrote the Unions on August 15, 1984 that if they did not accept this change in Respondent's proposal

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[20] Whether Respondent's course of conduct, including the nature of its bargaining proposals and the fact that it only offered the Unions 11 days to consider its June 19, 1984 contract proposal before implementing it, warrants the inference Respondent was bargaining in bad faith without a sincere desire to reach an agreement, was not alleged in the complaint as a violation of the Act. In entering into the stipulation of facts in this case the parties did not litigate this issue. Accordingly, insofar as General Counsel appears to be arguing Respondent was engaged in overall bad faith bargaining so as to preclude the existence of a valid impasse, I have not considered this argument.

by August 20, 1984, "we will presume that you have rejected the change and we will implement it immediately." By letters dated August 16, 1984 and August 20, 1984 the Unions notified Respondent they rejected this proposal. The record, the stipulation of facts, does not say whether Respondent implemented its August 15, 1984 proposal.

General Counsel contends Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the employees' benefits of employment when or about August 20, 1984 it implemented its August 15, 1984 benefit proposal without affording the Unions an opportunity to bargain about the matter. General Counsel's contention is without merit because there is insufficient evidence to establish that Respondent in fact implemented this proposal. I therefore shall recommend the complaint be dismissed insofar as it encompasses this allegation.

5. The Respondent's July 1985 bargaining conduct

Lastly, with respect to the General Counsel's contention that in July 1985 Respondent engaged in bad faith bargaining in violation of Section 8(a)(5) of the Act by proposing in negotiations that it be given the right to retain unilateral control over all aspects of the preapprentices' terms and conditions of employment, I am of the view that this contention is without merit for the reasons set forth earlier in the section of the Decision dealing with the setting aside by the Regional Director of the parties' settlement agreements.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[21]

ORDER

The complaint is dismissed in its entirety.

Dated: 8 April 1987

/s/ Jerrold H. Shapiro
Jerrold H. Shapiro
Administrative Law Judge

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[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, an express trust,	)	
Plaintiff-Appellant,	)	
and	)	
TRUSTEES OF COLORADO PIPE INDUSTRY INSURANCE TRUST, an express trust; et al.,	)	
Plaintiffs,	)	
v.	)	88-2938
HOWARD ELECTRICAL & MECHANICAL IND., a Colorado Corporation; et al.	)	
Defendants-Appellees	)	
and	)	
JACORE, INC., a Colorado corporation,	)	
Defendant.	)	

ORDER

Filed August 27, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK,

BRORBY, EBEL, Circuit Judges, and SEAY, District Judge.*

The court grants appellant's motion for an extension of time to respond to appellees' petition for rehearing and suggestion for rehearing en banc.

Upon consideration of appellees' petition and appellant's response, the panel judges deny rehearing.

In accordance with Fed R. App. P. 35(b), the clerk transmitted appellees' suggestion for rehearing en banc, together with appellant's response, to the judges of the court in regular active service. Since no member of the panel or judge in regular active service requested a vote, rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

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*Honorable Frank H. Seay, Chief Judge, United States District Court for the Eastern District of Oklahoma, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, an express trust,	)	
Plaintiff-Appellant,	)	
vs.	)	Court of Appeals
HOWARD ELECTRICAL & MECHANICAL, INC., a Colorado corporation, and HOWARD SYSTEMS, INC., a Colorado corporation,	)	Docket No. 88-2938
Defendants-Appellees.	)	

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

(Received June 15, 1990)

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June 15, 1990

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, an express trust,	)	
Plaintiff-Appellant,	)	
vs.	)	Court of Appeals Docket No. 88-2938
HOWARD ELECTRICAL & MECHANICAL, INC., a Colorado corporation, and HOWARD SYSTEMS, INC., a Colorado corporation,	)	
Defendants-Appellees.	)	

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the Panel decision is contrary to the following decisions of the United States Supreme Court and of the United States Court of Appeals for the Tenth Circuit, and consideration of the full court is necessary to secure and maintain uniformity of decisions in this Court:

Laborer's Health and Welfare Fund for N. Ca. v. Advanced Lightweight Concrete Co., 484 U.S. 539, 108 S. Ct. 830, 98 L. Ed. 2d 936 (1988)

Trustees of Ironworker's Fund v. A & P Steel, 812 F.2d 1518 (10th Cir. 1987)

Communication Workers of America v. U.S. West Direct, 847 F.2d 1475 (10th Cir. 1988)

Hicks v. The Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987)

Bruno v. Western Electric Co., 829 F.2d 957, 966 (10th Cir. 1987)

Bath v. Nat'l Ass'n of Intercollegiate Athletics, 843 F.2d 1315 (10th Cir. 1988)

DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 172, 103 S. Ct. 2281, 2294, 76 L. Ed. 2d 476, 494 (1983)

Park County Resource Council, Inc. v. United States Dept. of Agriculture, 817 F.2d 609, 619 (10th Cir. 1987)

I express a belief based upon a reasoned and studied professional judgment that this appeal involves questions of exceptional importance concerning the doctrine of federal agency (NLRB) primary jurisdiction in the context of national labor policy and the interrelations with another federal act (MPPAA), 29 U.S.C. §§ 1381-1462, and the question whether the Panel lacked jurisdiction to grant summary judgment for the Appellant and when material issues of fact remain for resolution by the district court.

By /s/ Earl K. Madsen
Earl K. Madsen
Attorney of record for
Appellees
Howard Electrical &
Mechanical,
Inc. and Howard Systems, Inc.

* * *

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, an express trust, Plaintiff-Appellant, vs. HOWARD ELECTRICAL & MECHANICAL, INC., a Colorado corporation, and HOWARD SYSTEMS, INC., a Colorado corporation, Defendants-Appellees.	Court of Appeals Docket No. 88-2938

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

Appellees Howard Electrical & Mechanical, Inc. and Howard Systems, Inc. ("Howard"), submit this Petition for Rehearing and Suggestion for Rehearing In Banc pursuant to F.R.A.P. 35, 40, and Tenth Circuit Rules 35 and 40.

REASON FOR GRANTING REHEARING BY PANEL

The Panel committed manifest error and exceeded the scope of its appellate jurisdiction in ordering entry of summary judgment for the Appellant rather than remanding this action for exercise of district court jurisdiction. Important issues exist for remand, including equitable tolling of the arbitration period, which have never been considered by the district court.

REASON FOR GRANTING REHEARING IN BANC

The Panel's opinion, which rejects the long established principle of primary jurisdiction of the NLRB and holds that arbitration of a withdrawal liability claim is necessary even when the identical claim is already pending in NLRB proceedings, reverses *sub silentio*, Tenth Circuit decisions and squarely contradicts Supreme Court authority.

I. STATEMENT OF THE CASE

The district court found that where previously initiated NLRB proceedings[1] over Howard's alleged unlawful implementation of a bargaining proposal had invoked that agency's jurisdiction to resolve the issue which was at the very heart of the Trustees' claim,[2] the court was without subject matter jurisdiction to proceed. The NLRB

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[1] The NLRB charge nos. 27-CA-8924, 8889, 8889-2, alleged that Howard unilaterally implemented, without bargaining, an August 1984 collective bargaining proposal to take its employees out of the Trustees' funds and instead placed them in Howard's own company benefit plans. The NLRB's jurisdiction over this refusal to bargain charge, NLRA – 29 U.S.C. § 158(a)(5), is clear and the NLRB had jurisdiction and power to require Howard to make post-labor contract expiration contributions to the Trustees' funds and to disestablish its plan for such unit employees. *See Peerless Roofing Co. v. NLRB*, 641 F.2d 734 (9th Cir. 1981).

[2] In Amended Complaint paragraphs 9, 16, and 17, the Trustees alleged that Howard "unilaterally terminated" its obligation to the Funds by "implementing" the August 1984 bargaining proposal which constituted "a withdrawal from" the Trustees' funds.

proceedings controlled and would be dispositive of the Trustees' claim, and the district court was required to defer to the primary jurisdiction of the NLRB. The court granted Howard's Motion for Summary Judgment on the jurisdictional issue and did not rule on the Trustees' Motion for Summary Judgment on liability issues. The district court did not reach the merits of any claim or defense other than Howard's jurisdictional challenge.

The Panel reversed and ordered entry of summary judgment for the Appellant Trustees. This decision has resulted in a windfall of some $550,000 to the Trustees, since the NLRB has entered its decision holding that the bargaining proposal of Howard was not implemented. Therefore, the claimed statutory withdrawal, based entirely on the same alleged implementation, simply did not occur. Nevertheless, the Panel concluded that Howard was required to invoke MPPAA[3] arbitration to resolve its claims and to proceed simultaneously with the previously invoked NLRB proceedings, as well as MPPAA arbitration on that issue. The Panel ruled that since Howard erroneously relied upon the primary jurisdiction of the board to resolve the issue and did not also invoke MPPAA arbitration, Howard waived its rights to defend the Trustees' withdrawal claims.

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[3] MPPAA refers to the Multi-employer Pension Plan Amendment Act of 1980, 29 U.S.C. §§ 1381-1462.

II. ARGUMENT

A. THE PANEL COMMITTED MANIFEST ERROR AND EXCEEDED THE SCOPE OF ITS APPELLATE JURISDICTION IN ORDERING ENTRY OF JUDGMENT FOR THE TRUSTEES RATHER THAN REMANDING THIS ACTION FOR EXERCISE OF DISTRICT COURT JURISDICTION.

Even if it is assumed that the Panel's decision is correct, and that Howard should have demanded arbitration even though the alleged triggering fact creating "withdrawal" was already squarely joined in NLRB proceedings, the proper disposition of this appeal is to remand this action for further proceedings and exercise of jurisdiction by the district court.

1. The Panel Exceeded the Scope of its Appellate Jurisdiction.

The appellate jurisdiction of this Court is limited to reviewing matters actually resolved by a final decision of the district court. *See Golden Villa Spa, Inc. v. Health Indus. Inc., et al.*, 549 F.2d 1363, 1364 (10th Cir. 1977); *Medical Dev. Corp. v. Indus. Molding Corp.*, 479 F.2d 345 (10th Cir. 1973). Here, there is no final order on the Trustees' motion on liability, and no notice of appeal concerning same. Further, as to matters which have not been resolved in the first instance by the district court, the proper appellate disposition is to remand for further proceedings. *See Hicks v. The Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987); *Bruno v. Western Electric Co.*, 829 F.2d 957, 966 (10th Cir. 1987); *Bath v. Nat'l Ass'n of Intercollegiate Athletics*, 843 F.2d 1315 (10th Cir. 1988) (because alternative grounds for dismissal with prejudice

were not considered in first instance by the district court, appropriate disposition, upon reversal, was remand for district court to make any such determination).

In this case, the district court dismissed the action for lack of subject matter jurisdiction and did not even address, much less resolve, issues such as Howard's defenses of equitable tolling of the arbitration period, whether exceptions to the doctrine of exhaustion of administrative remedies apply, what *res judicata* effect if any should be given to the NLRB proceedings, and other matters, including defenses arising subsequent to the MPPAA arbitration period.[4] Whether Howard is foreclosed from asserting defenses which would have been available to it had it invoked arbitration is one matter.

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[4] Such defenses include matters already presented in the court proceedings below, and noted in the record on appeal before this court: further fund contributions by Howard (ROA 7, p. 4); further tendered fund contributions by Howard (ROA 3, exs. 2, 3); Howard's acceptance of union's bargaining proposals, November 1986 (ROA 3, ex. 1, p. 22); new collective bargaining agreement entered into between Howard and unions dated July 2, 1988, continuing Howard's duty thereafter to contribute to the Funds (ROA 9, ex. A). This evidence illustrates some of the potential defenses that Howard did not yet have at the time the MPPAA duty to request or initiate arbitration expired, and relate to several sections of MPPAA, including 29 U.S.C. § 1385 (partial withdrawal); § 1386 (Adjustment for Partial Withdrawal); § 1387 (Reduction or Waiver of Complete Withdrawal Liability); or § 1388 (Reduction of Partial Withdrawal Liability) among other provisions potentially affected. Since these defenses did not yet exist during the arbitration period, they could not have been waived by any failure to demand arbitration.

Directing entry of summary judgment to preclude Howard from raising in the district court other material issues which have never been resolved is quite another matter. Such issues have never been addressed and certainly are not before this Court at this stage in the proceedings.

2. The Panel's Remand for Entry of Judgment for the Trustees Divests Howard of its Right to Argue That the Arbitration Period Should be Equitably Tolled.

a. When Equitable Tolling Has Not Been Considered by the District Court the Proper Appellate Mandate is to Remand.

If, *arguendo*, the Panel is correct in its conclusion that a MPPAA arbitrator had jurisdiction to determine the Trustees' withdrawal liability claim notwithstanding pending NLRB proceedings, then the issue becomes ripe as to whether that arbitration period should be equitably tolled given the unique procedural and substantive facts of this case. The Supreme Court has held that when an appellate court determines that a statute of limitations applies, but the district court never considered whether the limitations period should be equitably tolled, the appellate remedy is to remand the action to the district court for consideration of equitable tolling:

> Petitioner DelCostello contends, however, that certain events operated to toll the running of the statute of limitations until about three months before he filed suit. Since the District Court applied a 30-day limitations period, it expressly declined to consider any tolling issue. 524 F. Supp. at 725. Hence, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

See DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 172, 103 S. Ct. 2281, 2294, 76 L. Ed. 2d 476, 494 (1983). The same result has been reached by the Third Circuit. *See Martin v. Pullman Standard*, 726 F.2d 101, 102 (3rd Cir. 1984) (proper appellate mandate, when district court has not considered issue of equitable tolling of limitations period, is to remand for such consideration). Given the Panel's opinion holding that arbitration was proper, the question of whether the arbitration period should be equitably tolled, allowing the parties to now proceed to arbitration, becomes pertinent for the first time. The required appellate mandate is to remand.

b. Equitable Tolling is a Doctrine Which is Universally Accepted in the Context of MPPAA.

Equitable tolling of the arbitration period is a doctrine which is universally accepted in the context of MPPAA. For example, in *Banner Indus., Inc. v. Central States, S.E. and S.W. Areas Pension Fund*, 875 F.2d 1285 (7th Cir. 1989) an employer assessed with withdrawal liability failed to demand MPPAA arbitration and instead filed a declaratory action in district court, the proper forum for such litigation in the employer's view, arguing that it was not an "employer" subject to the arbitrator's jurisdiction. The federal forum eventually held that the "employer" issue is itself subject to arbitration and that the employer should have demanded arbitration. The Seventh Circuit upheld the district court's determination, however, that the arbitration period should be equitably tolled:

> [T]he issues presented question the arbitrator's authority to bind the parties. When the question

> is whether one of the parties falls within the arbitrator's jurisdiction, fairness considerations mandate that the deadline for arbitration be tolled until determination is made that the party is subject to mandatory arbitration. The district court recognized that this Banner issue had not been definitively decided previously.

Id. at 1291-91. Equitable tolling of the arbitration period in the context of MPPAA has also been applied in a number of other decisions and is a well recognized judicial vehicle to prevent draconian results.[5] In this case, Howard's argument in support of tolling of the arbitration period is as compelling, if not more so, than the

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[5] *See Republic Indus., Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 644 (4th Cir. 1983) (MPPAA arbitration period equitably tolled when constitutionality of statute and jurisdiction of arbitrator were challenged); *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Worker's Union (Indep.) Pension fund v. Central Trans., Inc.*, 888 F.2d 1161 (7th Cir. 1989) (Trustees' filing of claim in bankruptcy equitably tolled the period in which to demand arbitration of withdrawal liability); *The Flying Tiger Line, Inc. v. Central States, S.W. and S.E. Areas Pension Fund*, 659 F. Supp. 13, 18-19 (D. Me. 1986) (MPPAA arbitration period equitably tolled where company argued it was not an "employer" in federal court), *aff'd* 830 F.2d 1241 (3rd Cir. 1987); *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc.*, 698 F. Supp. 698 (W.D. Mich. 1987) (equitable tolling applied to MPPAA arbitration requirement); *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Worker's Union (Indep.) Pension Fund v. Chicago Kansas City Freight Line, Inc.*, 694 F. Supp. 469 (N.D. Ill. 1988) (MPPAA arbitration period equitably tolled even though employer did not file declaratory judgment action in federal court); *Robbins v. Pepsi-Cola Metro, Bottling Co.*, 636 F. Supp. 641, 679 n. 53 (N.D. Ill. 1986) (challenge to constitutionality of MPPAA in federal court did not result in waiver of right to invoke MPPAA arbitration).

arguments which have been accepted by numerous other courts.

3. The Panel's Remand for Entry of Judgment for the Trustees Divests Howard of its Right to Argue That the Exceptions to the Doctrine of Exhaustion of Administrative Remedies are Applicable.

The Panel's opinion represents the first judicial pronouncement in this case that the administrative remedy of arbitration should have been exhausted by Howard. As the Panel opinion correctly states, the doctrine of exhaustion of administrative remedies is not a jurisdictional requirement and is subject to a number of exceptions. The district court has not had the opportunity to resolve in the first instance whether any of the exceptions apply.

Until this Panel's decision, the Tenth Circuit has repeatedly refused to inflexibly require exhaustion of administrative remedies. *See Park County Resource Council, Inc. v. United States Dept. of Agriculture*, 817 F.2d 609, 619 (10th Cir. 1987); *Jette v. Bergland*, 579 F.2d 59, 62 (10th Cir. 1978). Instead, this Circuit has proclaimed, consistent with other circuits, that the doctrine of exhaustion "has some flexibility depending on the circumstances" and that "to apply it to a specific case requires an understanding of the purpose of the doctrine and of the administrative structure" at issue. *See Jette, supra*, 579 F.2d at 62.

Exhaustion in this case would not have fulfilled any of the purposes behind the exhaustion doctrine, in general, or the administrative structure of the MPPAA, in particular. The Panel correctly notes that the MPPAA was

designed for "informal and expeditious" resolution of disputes over withdrawal liability. See Panel Opinion at 16. However, there was nothing "informal and expeditious" about proceedings before the NLRB which were determinative of this dispute over withdrawal liability. As the Panel observed, the arbitrator would have been "obligated to accord collateral estoppel effect" to the NLRB determinations. See Panel Opinion at 17. To require arbitration, only to have the arbitrator sit and wait several years for the NLRB's findings on the determinative issue is a far cry from the "informal and expeditious" resolution contemplated by Congress.

For the same reason, exhaustion would not have furthered "development of a factual record." *See Park County, supra,* 817 F.2d at 619. The determinative factual record was developed in proceedings before the NLRB. Bound by the Board's findings, an arbitrator would have been left without any record to develop.

Exhaustion would not have promoted deference to an arbitrator's expertise.[6] *Id.* To the contrary, an arbitrator would have been required to defer to the expertise of the NLRB, which had before it the very issue on which withdrawal liability turned. Nor would exhaustion have

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[6] This Court recently held in *Centennial State Carpenter's Pension Trust Fund v. Centric Corp.*, No. 89-1081 (April 23, 1990) (Slip Op., p. 9), that MPPAA generally requires arbitration of disputes only "concerning" and "assessment" of withdrawal liability. MPPAA determinations are those involving the "merits of the liability assessment itself." The issue whether Howard implemented the August 1984 proposal is clearly not such a technical assessment issue within the special competence of a MPPAA arbitrator.

avoided "premature interruption of the administrative process." *Id.* The arbitral process would have been interrupted anyway, to wait for the NLRB's resolution of the determinative issues.

Where, as here, the purposes behind exhaustion "would not be promoted by application of the exhaustion doctrine, it is error to indiscriminately dismiss in its name". *See Park County, supra,* 817 F.2d at 619. *See also New Mexico Ass'n for Retarded Citizens v. New Mexico,* 678 F.2d 847, 850 (10th Cir. 1982) ("exhaustion principle is not indiscriminately applied"). Yet that is precisely what the Panel did.

The question is whether the Panel's opinion impermissibly removed this issue from ever being considered by the district court. If reversal was appropriate and if the Panel did not intend to change this Circuit's law on exhaustion of administrative remedies, a remand without and indiscriminate ruling on the issue is in order. If, however, the Panel intended to write "flexibility" out of the law of this Circuit and treat MPPAA exhaustion differently from the way this Circuit has treated exhaustion in other contexts, then Howard suggests that in banc consideration of this issue is appropriate.

In sum, for all of the above reasons, the proper mandate, even assuming the propriety of the Panel's opinion, is to remand this action to the district court for exercise of its jurisdiction and consideration of all such unresolved issues.

B. THE PANEL'S OPINION, WHICH HOLDS THAT ARBITRATION OF WITHDRAWAL LIABILITY IS NECESSARY EVEN WHEN THE ISSUE IS PENDING BEFORE THE NLRB, IS CONTRARY TO DECISIONS OF THIS COURT AND THE UNITED STATES SUPREME COURT AND REJECTS THE LONG-ESTABLISHED PRINCIPLE OF PRIMARY JURISDICTION OF THE NLRB.

The Court should grant rehearing or seek rehearing *in banc* because the Panel's decision effectively reverses, without citation, long-established law of this Circuit relating to the "primary jurisdiction" of the NLRB to adjudicate cases significantly involving the statute administered by that agency, and because rather than seeking an accommodation between two federal statutes, the Panel has subordinated the NLRA to the MPPAA with "draconian" results.

Panels of this Court have long held that district courts have jurisdiction to resolve National Labor Relations Act issues which may arise in varied contexts, so long as those ancillary issues are not the subject of proceedings before the National Labor Relations Board. When there is an NLRB proceeding pending, this Court adheres to long-standing principles of deferral to the NLRB's "primary jurisdiction." Thus in *Trustees v. A & P Steel, Inc.*, 812 F.2d 1518 (10th Cir. 1987), Judge Anderson, writing for Judges McKay and Baldock, considered the positions of conflicting circuits on the issue of NLRB primary jurisdiction. That panel found the position of the Fifth Circuit, as set forth in *Carpenter's Local U. No. 1846 v. Pratte-Farnsworth*, 690 F.2d 489 (5th Cir. 1982) more compatible with jurisdictional considerations. Having surveyed the law, the court read the much discussed *S.*

Prairie Const. Co. v. Operating Engineers, 425 U.S. 800 (1976) (*per curiam*), as turning on "the fact that the NLRB had already assumed initial jurisdiction in the dispute, yet had not made a ruling" on the NLRA issue arising in a § 301 context.[7] *Trustees v. A & P*, 812 F.2d at 1525.

With *S. Prairie* and *Pratte-Farnsworth* as guides, the court recognized that a district court may assume ancillary jurisdiction over labor act matters "at least where the same . . . question is not pending before the NLRB or where the NLRB's jurisdiction has not been invoked with respect to the dispute between the parties." 812 F.2d at 1527.[8]

Again, in *CWA v. U.S. West Direct*, 847 F.2d 1475 (10th Cir. 1988), another § 301 case raising NLRA issues, Judge Timbers, writing for Judges Baldock and Anderson, reemphasized that crucial to *A & P* and *S. Prairie* was whether the NLRB had already assumed jurisdiction of the issue. Referring to *A & P*, the court said:

> We concluded that *S. Prairie* need not apply . . . provided there is no prior or pending invocation of NLRB jurisdiction. 847 F.2d 1475, 1479 n. 1.

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[7] Section 301 of the NLRA confers jurisdiction upon federal district courts to resolve breach of labor contract issues. *A & P Steel, supra*, 812 F.2d at 1526.

[8] There is no conceptual distinction between district court consideration of an NLRA representational issue where there is no pending board proceeding, as in *A & P*, and consideration of unfair labor practices under the NLRA. They each fall within the broad primary jurisdiction rule.

Here, there is no question but that the jurisdiction of the NLRB had been invoked prior to the jurisdiction of the district court, and prior to the MPPAA arbitration period, for the purpose of resolving the identical issue of the termination of an NLRA obligation to continue pension contributions after contract expiration, through implementation of the alleged Howard bargaining proposal.

The NLRB has determined the issue in Howard's favor, a conclusion this Panel finds would have been binding on the arbitrator. The question, however, is whether the arbitrator, like the Court below, was bound by principles of primary jurisdiction through the prior invocation of Board process. Under *A & P, U.S. West Direct*, and their progenitor, *Pratt-Farnsworth*, the applicability of primary jurisdiction is clear.

The position of this Court's earlier Panels is perfectly consistent with the position of the Supreme Court in *Laborer's Health & Welfare Fund for N. Ca. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 108 S.Ct. 830, 98 L. Ed. 2d 936 (1988). In that case, the Supreme Court discussed the accommodation that Congress and the courts require in the complex interrelations between NLRA and MPPAA.[9] The court noted that "withdrawal liability"

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[9] The Supreme Court's rule of tribunal deference to the exclusive primary jurisdiction of the NLRB is of long standing: *Myers v. Bethlehem Shipbuilding Corp. Ltd.*, 303 U.S. 41, 50-51, 58 S. Ct. 459, 82 L.Ed. 638, 644 (1938) (jurisdiction of NLRB under Act is exclusive and must be exhausted before any other judicial relief may be sought); *Garner v. Teamsters Union*, 346 U.S. 485, 490-91, 74 S. Ct. 161, 98 L. Ed. 228, 239-40 (1953) (Congress established a rule for "any tribunal competent to apply law

(Continued on following page)

after labor contract expiration is derived solely from an "obligation imposed by the NLRA," citing 29 U.S.C.

(Continued from previous page)

generally to the party." That rule precludes determinations in "labor controversies" by a "multiplicity of tribunals" and confides primary jurisdiction for same to the NLRB); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775, 783 (1959) (state and federal courts "must defer" to the exclusive primary jurisdiction, the "exclusive competence," of the NLRB when "an activity is arguably subject to § 7 or § 8 of the Act [Unfair Labor Practice section 8(a)(5), as here] if the "danger" of interference with national labor policy is to be averted); *Int'l Longshoremen's Assn. v. Davis*, 476 U.S. 380, 391, 106 S. Ct. 1904, 90 L. Ed. 2d 389, 401, (1986) ("since *Garmon* . . . we have also reaffirmed . . . a determination that in enacting the NLRA, Congress intended for the Board generally to exercise exclusive jurisdiction in this area").

Professor Kenneth Culp Davis in *Administrative Law Treaties*, Ch.22 (4th Ed. 1983), summarizes primary jurisdiction from the voluminous adjudicated cases, that agencies have exclusive primary jurisdiction to resolve "issues of fact, subject to a limited review" and the normal power of the courts is "suspended" or "preempted" pending the agency action, which "transfers" the "power to determine" from court to agency, citing *United States v. W. Pac. Ry. Co.*, 352 U.S. 59, 63-64 (1956), at p. 83. Professor Davis summarized the use of the doctrine:

> The primary jurisdiction principle applies to all kinds of administrative action and does not notably differ for regulated industries (such as transportation, broadcasting, public utilities) and for programs that cut across industries (such as labor relations, anti-trust, health and safety, environment).

Section 22:4, p. 89.

§ 1392(a)(2), in both delinquent contribution and withdrawal contexts. In any case involving previously filed unfair labor practice charges constituting such basis for withdrawal liability, the Supreme Court noted MPPAA procedures will normally defer to the primary jurisdiction of the NLRB under the federal labor policy:

> [W]hether an employer's unilateral decision to discontinue contributions to a pension plan [permanent withdrawal] constitutes a violation of the statutory duty to bargain in good faith is the kind of question that is routinely resolved by the administrative agency with expertise in labor law. There are situations in which district judges must occasionally resolve labor issues, but they surely represent the exception rather than the rule. **In cases like this,** [post-contract expiration, labor law cases] which involve either an actual or an "arguable" violation of § 8 of the NLRA, federal courts typically defer to the judgment of the NLRB. *See San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 245 (1959).[19]

The Court continued with its footnote 19:

> It is true, as petitioners point out, that district courts may find it necessary to decide whether an impasse occurred in withdrawal liability cases in which there is a dispute over the date of withdrawal. In such a proceeding, however, **there would not normally be any claim that the employer was guilty of an unfair labor practice** or that liquidated damages were mandated because the employer misjudged the impasse date. (Emphasis added)

There can be no doubt that the Supreme Court fully understood that withdrawal liability involving contested unfair labor practices charges was not something for MPPAA determination, but was subject to the exclusive

primary jurisdiction of the NLRB to which deferral will be given. Here, the labor law issue was not "collateral" to MPPAA. It was central and dispositive of the subsequent MPPAA claim which simply reasserted the identical issue. Under these circumstances, MPPAA arbitration is not required. The Court must adopt the NLRB determined facts and dismiss the withdrawal claim. *Cuyamaca Meats v. San Diego & Imperial Counties Butchers' & Food Employer's Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987).

The Panel opinion thus clearly involves important issues relating to national labor policy and is at odds with long-established principles of primary jurisdiction. Rather than seeking accommodation between two federal statutes, the Panel has obliterated, in this Circuit, the role of the National Labor Relations Board in many bargaining disputes and has drastically modified, without comment, the national labor policy requiring deference to NLRB primary jurisdiction. This Court, *in banc*, should grant rehearing of this important issue of national labor policy in this case.

Respectfully submitted this 15th day of June 1990.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June 1990, I have placed a true and correct copy of the foregoing **PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*** in the United States mail, first-class postage prepaid, properly addressed as follows:

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Denver, Colorado 80202-0419
Attorney for Plaintiff-Appellant

/s/ Connie L. Doehring

§ 158. Unfair labor practices

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer –

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157];
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 USCS § 159(a)].

* * *

---

§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part [29 USCS §§ 1381 et seq.] to be the withdrawal liability.

(b) For purposes of subsection (a) –

> (1) The withdrawal liability of an employer to a plan is the amount determined under section 4211 [29 USCS § 1391] to be the allocable amount of unfunded vested benefits, adjusted –
>
> > (A) first, by any de minimis reduction applicable under section 4209 [29 USCS § 1389],

(B) next, in the case of a partial withdrawal, in accordance with section 4206 [29 USCS § 1386],

(C) then, to the extent necessary to reflect the limitation on annual payments under section 4219(c)(1)(B) [29 USCS § 1399(c)(1)(B)], and

(D) finally, in accordance with section 4225 [29 USCS § 1405].

(2) The term "complete withdrawal" means a complete withdrawal described in section 4203 [29 USCS § 1383].

(3) The term "partial withdrawal" means a partial withdrawal described in section 4205 [29 USCS § 1385].

(Sept. 2, 1974, P. L. 93-406, Title IV, Subtitle E, Part 1, § 4201, as added Sept. 26, 1980, P. L. 96-364, Title I, § 104(2), 94 Stat. 1217.)

* * *

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§ 1382. Determination and collection of liability; notification of employer

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part [29 USCS §§ 1381 et seq.], shall –

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

§ 1383. Complete withdrawal

(a) Determinative factors. For purposes of this part [29 USCS §§ 1381 et seq.], a complete withdrawal from a multiemployer plan occurs when an employer –

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building an construction industry. (1) Notwithstanding subsection (a), in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if –

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan –

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if –

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer –

(i) continues to perform work in the jurisdiction of the collective bargaining

agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 4041A(a)(2) [29 USCS § 1341a(a)(2)]), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

* * *

(d) Other determinative factors. (1) Notwithstanding subsection (a), in the case of an employer who –

(A) has an obligation to contribute under a plan described in paragraph (2) primarily for work described in such paragraph, and

(B) does not continue to perform work within the jurisdiction of the plan,

a complete withdrawal occurs only as described in paragraph (3).

(2) A plan is described in this paragraph if substantially all of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry.

(3) A withdrawal occurs under this paragraph if –

(A) an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and

(B) either –

(i) the corporation determines that the plan has suffered substantial damage to its contribution base as a result of such cessation, or

(ii) the employer fails to furnish a bond issued by a corporate surety company that is an acceptable surety for purposes of section 412 [29 USCS § 1112], or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to 50 percent of the withdrawal liability of the employer.

(4) If, after an employer furnishes a bond or escrow to a plan under paragraph 3(B)(ii), the corporation determines that the cessation of the employer's obligation to contribute under the plan (considered together with any cessations by other employers), or cessation of covered operations under the plan, has resulted in substantial damage to the contribution base of the plan, the employer shall be treated as having withdrawn from the plan on the date on which the obligation to contribute or covered operations ceased, and such bond or escrow shall be paid to the plan. The corporation shall not make a determination under this paragraph more than 60 months after the date on which such obligation to contribute or covered operations ceased.

(5) If the corporation determined that the employer has no further liability under the plan either –

(A) because it determines that the contribution base of the plan has not suffered

substantial damage as a result of the cessation of the employer's obligation to contribute or cessation of covered operations (considered together with any cessation of contribution obligation, or of covered operations, with respect to other employers), or

(B) because it may not make a determination under paragraph (4) because of the last sentence thereof,

then the bond shall be cancelled or the escrow refunded.

(6) Nothing in this subsection shall be construed as a limitation on the amount of the withdrawal liability of any employer.

(e) Date of complete withdrawal. For purposes of this part [29 USCS §§ 1381 et seq.], the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

* * *

---

§ 1392. Obligation to contribute

(a) Definition. For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising –

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

(b) Payments of withdrawal liability not considered contributions. Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.

(c) Transactions to evade or avoid liability. If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

§ 1398. Withdrawal not to occur merely because of change in business form or suspension of contributions during labor dispute

Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because –

(1) an employer ceases to exist by reason of –

(A) a change in corporate structure described in section 4069(b) [29 USCS § 1369(b)], or

(B) a change to an unincorporated form of business enterprise, if the change causes no interruption in employer contributions or obligations to contribute under the plan, or

(2) an employer suspends contributions under the plan during a labor dispute involving its employees.

For purposes of this, a successor or parent corporation or other entity resulting from any such change shall be considered the orginal employer.

§ 1399. Notice, collection, etc., of withdrawal liability

(a) Furnishing of information by employer to plan sponsor. An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete or partial withdrawal by employer. (1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall –

(A) notify the employer of –

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer –

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of –

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

(c) Payment requirements; amount, etc. (1)(A)(i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 4211 [29 USCS § 1391], adjusted if appropriate first under section 4209 [29 USCS § 1389] and then under section 4206 [29 USCS § 1386] over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation of the plan.

(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

(C)(i) Except as provided in subparagraph (E), the amount of each annual payment shall be the product of –

(I) the average annual number of contribution base units for the period of 3 consecutive plan years, during the period of 10 consecutive plan years ending before the plan year in which the withdrawal occurs, in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest, and

(II) the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs.

For purposes of the preceding sentence, a partial withdrawal described in section 4205(a)(1) [29 USCS § 1385(a)(1) shall be deemed to occur on the last day of the first year of the 3-year testing period described in section 4205(b)(1)(B)(i) [29 USCS § 1385(b)(1)(B)(i)].

(ii)(I) A plan may be amended to provide that for any plan year ending before 1986 the amount of each annual payment shall be (in lieu of the amount determined under clause (i)) the average of the required employer contributions under the plan for the period of 3 consecutive plan years (during the period of 10 consecutive plan years ending with the plan year preceding the plan year in which the withdrawal occurs) for which such required contributions were the highest.

(II) Subparagraph (B) shall not apply to any plan year to which this clause applies.

(3)

No. 90-844

In The

Supreme Court of the United States

October Term, 1990

HOWARD ELECTRICAL & MECHANICAL, INC., and HOWARD SYSTEMS, INC.,

Petitioners,

v.

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF

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TABLE OF CONTENTS

Page

ARGUMENT 1

A. THE TRUSTEES CONFIRM NLRB JURISDICTION OVER THE WITHDRAWAL ISSUE IN THIS CASE, AND THE CRUCIAL FACT THAT NO WITHDRAWAL OCCURRED 1

B. THE TRUSTEES ERRONEOUSLY ARGUE THAT IT IS "UNIFORMLY RECOGNIZED" THAT ARBITRATION IS MANDATORY..... 3

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Banner Indus., Inc. v. Central States, S.E. and S.W. Areas Pension Fund, 875 F.2d 1285 (7th Cir.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 563, 107 L.Ed.2d 558 (1989) 6

Carrier's Container Council v. Mobile S.A. Assoc., 896 F.2d 1330 (11th Cir. 1990) 6

Central States Pension Fund v. Time D.C., 826 F.2d 320 (5th Cir. 1987), *cert. denied*, 284 U.S. 1030, 108 S.Ct. 732 ..... 4, 5

Central Transp., Inc. v. Central States, S.E. and S.W. Areas Pension Fund, 816 F.2d 678 (6th Cir. 1987), *aff'd per curiam*, 639 F. Supp. 788 (E.D. Tenn. 1986), *cert. denied*, 484 U.S. 926, 108 S.Ct. 290, 98 L.Ed.2d 250 (1987) 6

Cuyamaca Meats v. San Diego Script & Imperial Counties Butcher & Food Employers' Pension Trust Fund, 827 F.2d 491 (9th Cir. 1987) 6

Dorn's Transp. v. Teamsters Pension Trust Fund, 787 F.2d 897 (3d Cir. 1986) 6

Flying Tiger Line v. Central States, S.W. and S.E. Areas Pension Fund, 659 F.Supp. 13 (D. Del. 1986), *aff'd*, 830 F.2d 1241 (3d Cir. 1987) 6

Flying Tiger Line v. Teamster Pension Fund of Philadelphia, 830 F.2d 1241 (3d Cir. 1987) 4

IAM Nat'l Pension Fund v. Clinton Engines, 825 F.2d 415 (D.C. Cir. 1987) 4

ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks, 846 F.2d 836 (2d Cir. 1988) 4

Laborers Health & Welfare Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988) 2, 3

TABLE OF AUTHORITIES – Continued

Page

Marvin Hayes Line, Inc. v. Central States Pension Fund, 814 F.2d 297 (6th Cir. 1987)..... 4

Mason and Dixon Tank Lines v. Central States Pension Fund, et al., 852 F.2d 156 (6th Cir. 1988).....4, 6

Park South Hotel v. New York Hotel Trades Council, 851 F.2d 578 (2d Cir. 1988), *cert. denied*, 488 U.S. 966, 109 S.Ct. 493, 102 L.Ed.2d 530 (1988)..... 6

Republic Indus., Inc. v. Teamsters Joint Council No. 83 of Va. Pension Fund, 718 F.2d 628 (4th Cir. 1983)..... 6

Robbins v. Admiral Merchants Motor Freight Co., 846 F.2d 1056 (7th Cir. 1988).....4, 5

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959)..... 3

Teamsters Pension Fund v. McNichols Transp. Co., 848 F.2d 20 (2d Cir. 1988) 4, 5

Time D.C., Inc. v. Management Labor Welfare & Pension Funds of Local 1730, 756 F.2d 939 (2d Cir. 1985)..... 5

Western Teamsters Fund v. Allyn Transp., 832 F.2d 504 (9th Cir. 1987).....4, 5

Petitioners Howard Electrical & Mechanical, Inc. and Howard Systems, Inc. (collectively "Howard") respectfully submit this Reply Brief in support of their Petition for Writ of Certiorari.

ARGUMENT

A. THE TRUSTEES CONFIRM NLRB JURISDICTION OVER THE WITHDRAWAL ISSUE IN THIS CASE, AND THE CRUCIAL FACT THAT NO WITHDRAWAL OCCURRED.

The Trustees concede in their statement of the Question Presented For Review that the issue here, whether Howard implemented a bargaining proposal which constituted withdrawal from the Plan, is an issue that "would under most circumstances by resolved by the National Labor Relations Board."[1] The Trustees do not dispute that Howard did not withdraw from the subject Plan, nor that the identical issue upon which the Trustees based their withdrawal liability claim was resolved by the NLRB in favor of Howard, i.e., that Howard did not implement its bargaining proposal and therefore no withdrawal could have occurred. The Trustees do not dispute that the Tenth Circuit's Decision results in a $555,000 windfall to them. These conceded jurisdictional and operational facts squarely frame the issue of primary

[1] The Trustees in their Opposition Brief at page 1 also assert that this action did not arise out of a labor dispute. If the action did not arise out of a labor dispute, there would be no basis for the conceded NLRB jurisdiction.

jurisdiction presented for this Court's review in the Petition herein.

While the Trustees admit in their Question Presented For Review that the issue of withdrawal liability here would under most circumstances be resolved by the National Labor Relations Board, they do not at any point even mention the issue of primary jurisdiction in the Opposition Brief. The only argument advanced in this context by the Trustees is that, in their view, the basis of their claim is under the Multi-Employer Pension Plan Amendment Act of 1980 (MPPAA) (Opposition Brief, p. 1), and that federal courts have jurisdiction over such claims under that Act (Opposition Brief, p. 5). Having previously conceded that the National Labor Relations Board normally has jurisdiction to hear the particular withdrawal liability issue involved in this case, the Trustees' argument simply raises the issue over which tribunal has primary jurisdiction. The Opposition Brief does not attempt to argue or resolve that issue.

The Petition and the Trustees' Brief in Opposition to the Petition thus present the undisputed facts and issue here. Does the Federal District Court, or for that matter, an arbitrator, under MPPAA, 29 U.S.C. § 1381, *et seq.*, have jurisdiction over the kind of question that is routinely resolved by the administrative agency with expertise in labor law, the NLRB, as the Tenth Circuit held? As Petitioners presented in their Petition, this case raises a difficult and important question regarding the application of *Advanced Lightweight* in this unusual context:

> [W]hether an employer's unilateral decision to discontinue contributions to a pension plan [permanent withdrawal] constitutes a violation

> of the statutory duty to bargain in good faith is the kind of question that is routinely resolved by the administrative agency with expertise in labor law. There are situations in which district judges must occasionally resolve labor issues, but they surely represent the exception rather than the rule. *In cases like this [post-contract expiration, labor law cases] which involve either an actual or an "arguable" violation of § 8 of the NLRA, federal courts typically defer to the judgment of the NLRB. See San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 245 (1959).

Laborers Health & Welfare Fund v. Advanced Lightweight Concrete Company, 484 U.S. 539, 552, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988) (emphasis added).

This Court should grant the Petition and reverse the decision of the Tenth Circuit rejecting this Court's confirmation of NLRB primary jurisdiction in this identical context. Only by this action will the threat to national labor policy resulting from the rejection of the long-standing primary jurisdiction doctrine and the admitted windfall payment of some $555,000, when no withdrawal occurred, as ordered by the Tenth Circuit, be rectified.

B. THE TRUSTEES ERRONEOUSLY ARGUE THAT IT IS "UNIFORMLY RECOGNIZED" THAT ARBITRATION IS MANDATORY.

The Trustees argue that it is now "uniformly recognized" that MPPAA arbitration "is mandatory" for any MPPAA related issue. (Opposition Brief, p. 7). Several cases are cited and discussed. However, it is indeed not uniformly recognized that MPPAA arbitration is mandatory in every case. Further, the Trustees fail to mention

that not one of these cases upon which they rely joins the primary jurisdiction issue presented in this case. These cases are also distinguishable on other grounds.[2]

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[2] The Trustees, at pages 7 and 8 of their Opposition Brief, cite to a series of cases for this erroneous proposition: *IAM National Pension Fund v. Clinton Engines*, 825 F.2d 415 (D.C. Cir. 1987); *Teamsters Pension Fund v. McNicholas Transportation Co.*, 848 F.2d 20 (2d Cir. 1988); *ILGWU National Retirement Fund v. Levy Brothers Frocks*, 846 F.2d 836 (2nd Cir. 1988); *Central States Pension Fund v. Time D.C.*, 826 F.2d 320 (5th Cir. 1987) *cert. denied*, 284 U.S. 1030, 108 S. Ct. 732; *Flying Tiger Line v. Teamster Pension Fund of Philadelphia*, 830 F.2d 1241 (3d Cir. 1987); *Marvin Hayes Line, Inc. v. Central States Pension Fund*, 814 F.2d 297 (6th Cir. 1987); *Mason & Dixon Tanklines v. Central States Pension Fund, et al.*, 852 F.2d 156 (6th Cir. 1988); *Robbins v. Admiral Merchants Motor Freight Co.*, 846 F.2d 1056 (7th Cir. 1988); *Western Teamsters Fund v. Allyn Transportation Co.*, 832 F.2d 504 (9th Cir. 1987).

Not one of the cases cited involves previously invoked NLRB jurisdiction on pending charges on the identical factual claim subsequently raised in the MPPAA proceeding. None involve application of the doctrine of primary jurisdiction. Federal appellate courts have favored ERISA (MPPAA) arbitration where there was no claim of NLRA jurisdiction, or any NLRB proceedings. In those instances a question of MPPAA statutory interpretation, standing alone, has been held to not excuse arbitration for an otherwise proper MPPAA claim. *See IAM National Pension Fund v. Clinton Engines, supra; Marvin Hayes Lines, Inc. v. Central States Pension Fund, supra; Mason & Dixon Tank Lines v. Central States Pension Fund, et al., supra* (for some statutory issues not involving a jurisdictional challenge) and *see ILGWU National Retirement Fund v. Levy Bros. Frocks, supra.*

In cases where employers have simply argued that their admitted withdrawals from funds occurred before the effective date of the statute, and they therefore had no obligation to

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In fact, not only is it not "uniformly recognized" that arbitration "is mandatory," as alleged by the Trustees, but, on the contrary, a number of exceptions to MPPAA arbitration have developed as now well settled doctrines.

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arbitrate such claims, courts have resolved those questions in favor of ERISA arbitration. *See Robbins v. Admiral Merchants Motor Freight Co., supra; Western Teamsters Fund v. Allyn Transportation Co., supra.*

In *Teamsters Pension Fund v. McNicholas Transportation Company, supra,* the Company ceased contributions to a fund at a plant where it had no labor dispute, but because its employees represented by the same union were on strike against the Company at another of its plants where there was a labor dispute. There were no prior NLRB proceedings, and no challenge to the jurisdiction of the court in the ERISA proceeding. The court held arbitration was required over that withdrawal, but significantly pointed with approval to the decision in *T.I.M.E. DC, Inc. v. Management Labor Welfare & Pension Funds of Local 1730,* 756 F.2d 939, 945 (2d Cir. 1985), holding that in circumstances where there is no question of fact for the ERISA arbitrator, and the question of statutory interpretation at issue is outside the scope of the issue Congress directed for the arbitrator in ERISA matters, there is no requirement for the exhaustion of the arbitration remedy. *See* 848 F.2d at 22.

In *Central States Pension Fund v. T.I.M.E. DC, supra,* the court in fact held ERISA arbitration was not applicable where it would lead to irreparable harm to the employer, or would not lead to the application of superior expertise, nor promote judicial economy. The court simply held the employer did not make a showing of facts sufficient to excuse a failure to exhaust administrative remedies, noting, however, that arbitration was not a jurisdictional prerequisite to district court review under ERISA. 826 F.2d at 328, 329.

None of these cited cases is dispositive of the issue before this Court.

Courts find that MPPAA arbitration is not mandatory but is rather in the nature of an administrative remedy which should, normally, be exhausted. Like any other administrative remedy, however, exhaustion is not required (i.e., MPPAA arbitration is not required) when certain "exceptions" apply. *See Central Transport, Inc. v. Central States, S.E. and S.W. Areas Pension Fund*, 816 F.2d 678 (6th Cir. 1987) (*per curiam affirming* 639 F. Supp. 788 (E.D. Tenn. 1986)), *cert. denied*, 484 U.S. 926, 108 S. Ct. 290, 98 L.Ed.2d 250 (1987); *Mason & Dixon Tanklines v. Central States, etc.*, 852 F.2d 156, 167 (6th Cir. 1988) (jurisdictional issue whether the company was a covered employer under ERISA was held not arbitrable, but after that issue was resolved, the issue of whether the two businesses involved were under common control was an issue requiring ERISA arbitration); *Carrier's Container Council v. Mobile S.A. Assoc.*, 896 F.2d 1330, 1345 (11th Cir. 1990); *Park South Hotel v. New York Hotel Trades Council*, 851 F.2d 578 (2d Cir. 1988), *cert. denied*, 488 U.S. 966, 109 S. Ct. 493, 102 L.Ed.2d 530 (1988); *Dorn's Transp. v. Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986); *Cuyamaca Meats v. San Diego Script & Imperial Counties Butcher & Food Employers' Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987). *See* Howard's Petition at 17-23.

Still other courts have excused MPPAA arbitration under the doctrine of "equitable tolling." *See Banner Indus., Inc. v. Central States, S.E. and S.W. Areas Pension Fund*, 875 F.2d 1285 (7th Cir.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 563, 107 L.Ed.2d 558 (1989); *Republic Indus., Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 644 (4th Cir. 1983); *The Flying Tiger Line, Inc. v. Central States, S.W. and S.E. Areas Pension Fund*, 659 F.

Supp. 13 (D. Del. 1986), *aff'd* 830 F.2d 1241, 1246-1247, 1256 (3d Cir. 1987). *See* Howard's Petition, at 23-26, including citation of other authority.[3]

The Trustees are simply wrong in their argument that it is "uniformly recognized" that MPPAA arbitration "is mandatory" in all circumstances. As shown, and to the contrary, the Federal Courts of Appeals (other than the Tenth Circuit) have carefully formulated exceptions to the arbitration requirement, to avoid draconian and inequitable results, in recognition of the fact that MPPAA arbitration is not jurisdictional. The Tenth Circuit, by failing to properly apply the law adopted by the sister circuits, has created a conflict with those courts. The Tenth Circuit Decision conflicting with the other circuits' decisions does not simply allow arbitration to "reign supreme." It

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[3] The Trustees assert that Howard did not raise the equitable tolling issue until the Petition for Rehearing. Opposition Brief, pp. 11-12. The trial court proceedings were held on the primary jurisdiction issue in the context of summary judgment motions of both parties. Until the unprecedented Decision of the Tenth Circuit here, the issue of equitable tolling could not have been raised. There was no basis for an equitable tolling claim. *See* Howard's Petition, p. 26. No stronger case for equitable tolling could be made in light of the Tenth Circuit's Decision than the conceded facts that no withdrawal occurred, that the NLRB's decision on the issue of withdrawal liability here was its jurisdiction to make "under most circumstances" (Trustees' Question Presented For Review), and when, in light of those facts, previously determined by the NLRB, there could be no factual determination made by the arbitrator other than to adopt the NLRB's decision. To now argue that there is some substantive decision required for MPPAA arbitration is to blink the conceded facts in the case.

mandates that arbitration "reigns in absurdity" without regard to the nature of the legal issues presented, without regard to the conceded facts of record, and without regard to the long-standing federal scheme of adherence to the primary jurisdiction of the NLRB in resolving disputes falling squarely within its NLRA statutory authority.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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